TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1916

No. [redacted] 213

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

ELIZABETH BLACKWELL.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

FILED AUGUST 8, 1916.

(24,870)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 587.

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

ELIZABETH BLACKWELL.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

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1 City Court of Elberton, November Term, 1913.

Suit for Damages.

ELIZABETH BLACKWELL
v.
SEABOARD AIR LINE RAILWAY.

GEORGIA,
Elbert County:

Be it remembered that on September 24, 1913, Elizabeth Blackwell brought her suit against the Seaboard Air Line Railway returnable to the November term, 1913, of the city court of Elberton in said county, alleging in her petition that she had sustained damages at the hands of the defendant by reason of the homicide of her son, Willie Blackwell; said case being the case stated in the caption of this bill of exceptions. Within due time the defendant filed its answer to the petition in said case, and said petition and answer are a part of the record in said case. Thereafter, on November 10, 1913, the plaintiff filed a demurrer to the twenty-third (23rd) paragraph of the answer of the defendant, said paragraph of said answer setting up in substance that the only negligence alleged in the petition being a failure to comply with the statute of this State commonly known as the Blow Post Law and that said statute was void for the reason that it contravened the Constitution of the United States. Said demurrer to said paragraph twenty-three of the answer came on to be heard, and on January 24, 1914, the presiding judge of said court, Honorable George C. Grogan, passed an order
2 sustaining said demurrer and striking all of paragraph twenty-three of the answer except the words "This defendant denies that the failure to comply with said Blow Post Law was negligence on its part relatively to the transaction in question." Thereafter and within the time allowed by law the defendant tendered its bill of exceptions pendente lite excepting to the order and judgment of the court sustaining said demurrer and striking the paragraph of the answer as above stated, and said bill of exceptions was in due time signed and certified by the presiding Judge and entered upon the records of said court and is a part of the record in said case. Thereafter during the regular February term, 1914, of the City Court of Elberton, his honor, George C. Grogan, judge of said court, then and there presiding, said case came on for trial and resulted in a verdict in favor of the plaintiff for the sum of One Thousand ($1,000) Dollars. During said term of said court and within the time allowed by law the defendant filed its motion for a new trial and the same

was under orders duly passed set down for a hearing and determination in vacation. In pursuance of such orders the motion for new trial came on to be heard on March 13, 1914, and the presiding judge passed an order overruling said motion and refusing a new trial in said case. A brief of the evidence in said case was at the time of the hearing of said motion duly approved by the judge and filed
3 in the office of the clerk and is a part of the record in said case.

To the decision and judgment of the court sustaining the demurrer of the plaintiff to paragraph twenty-three of the answer of the defendant, the defendant, hereinafter called the plaintiff in error, excepted and here and now excepts and assigns said order and judgment as error, and also assigns error herein upon its bill of exceptions pendente lite above referred to.

To the decision, order and judgment of the court overruling the motion for new trial and refusing a new trial, plaintiff in error then and there excepted and here and now excepts and assigns the same as error.

For a more specific assignment of error plaintiff in error alleges:

1. The court erred in sustaining the demurrer to paragraph twenty-three of the answer of the defendant.

2. The court erred in not overruling the demurrer to paragraph twenty-three of the defendant's answer.

3. The court erred in overruling the motion for new trial and in refusing a new trial in said case.

4. The court erred in not granting a new trial upon each and every ground set forth in the motion for new trial.

4 Plaintiff in error specifies the following portions of the record in said case as material to a clear understanding of the errors complained of in this bill of exceptions:

(*a*) The original petition of the plaintiff and all amendments thereto.

(*b*) The original answer of the defendant and all of the paragraphs thereof, including paragraph twenty-three which was stricken upon demurrer.

(*c*) The demurrer of the plaintiff to paragraph twenty-three of the defendant's answer.

(*d*) The order sustaining the demurrer of plaintiff to paragraph twenty-three of defendant's answer.

(*e*) The motion for new trial of the defendant.

(*f*) The brief of evidence filed in said case.

(*g*) The order overruling the motion for new trial in said case.

(*h*) The exceptions pendente lite filed by the defendant to the judgment sustaining demurrer to paragraph twenty-three of the answer.

(*i*) The verdict of the jury and the judgment thereon.

(*j*) The entries of filing of each and all of the parts of the record above specified.

5 And now within the time provided by law and within thirty (30) days of the entry of the judgment overruling said motion for new trial comes the plaintiff in error and tenders this its bill of exceptions and prays that the same may be certified as pro-

vided by law in order that the errors complained of may be considered and corrected by the Court of Appeals of this State.

This 31st day of March, 1914.

Z. B. ROGERS,
H. J. BREWER,
F. C. SHACKELFORD,
COBB & ERWIN,
Attorneys for Plaintiff in Error.

P. O. Address of Counsel:

Cobb & Erwin, Athens, Ga.
F. C. Shackelford, Athens, Ga.
H. J. Brewer, Elberton, Ga.
Z. B. Rogers, Elberton, Ga.

I do certify that the foregoing bill of exceptions is true and specifies all the evidence and specifies all of the record material to a clear understanding of the errors complained of; and the clerk of the city court of Elberton is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such and cause the same to be transmitted to the March term, 1914, of the Court of Appeals of the State of Georgia that the errors alleged to have been
6 committed may be considered and corrected.

This 31st day of March, 1914.

GEO. C. GROGAN,
Judge City Court of Elberton.

I acknowledge due and legal service of the foregoing bill of exceptions and the certificate of the judge thereon, and having received a copy of said bill of exceptions and certificate of the judge, I waive all further service or notice.

This 31st day of March, 1914.

PULLIAM PROFFITT,
Attorney for Elizabeth Blackwell, Defendant in Error.

P. O. Address of Counsel:

Pulliam Proffitt, Elberton, Ga.

GEORGIA,
Elbert County:

Clerk's Office, City Court of Elberton.

ELBERTON, GA., April 2nd, 1914.

I hereby certify that the foregoing is the true original bill of exceptions, filed in this office, in the case of Elizabeth Blackwell against Seaboard Air Line Railway therein referred to; and that a copy thereof has been made and is now of file in this office.

Witness my signature and the seal of said court hereto affixed, this the day and year above written.

[SEAL.]

W. A. RUCKER,
Clerk City Court of Elberton.

7 (Endorsed:) No. —. In Georgia Court of Appeals, March Term 1914. From City Court of Elberton. Seaboard Air Line Ry., Plaintiff in error, v. Elizabeth Blackwell, Defendant in error. Original Bill of Exceptions. Filed in office this 1st day of April, 1914. W. A. Rucker, Clerk. Cobb & Erwin, Attorneys-at-law, Athens, Ga. Case No. 5631. Court of Appeals of Georgia, March Term, 1914. Seaboard Air Line Ry. versus Blackwell. Bill of Exceptions. Filed in office Apr. 3, 1914. Logan Bleckley, C. C. A. Ga.

8 GEORGIA,
Elbert County:

To the city court of Elberton:

The plaintiff, Elizabeth Blackwell, brings this petition against the defendant, the Seaboard Air Line Railway, and respectfully shows:

1. Said defendant is a foreign corporation operating a line of railroad in the State of Georgia and through the county of Elbert, and having an office and an agent in said county upon whom service may be perfected.

2. Said defendant has injured and damaged your petitioner in the sum of two thousand, nine hundred and ninety-nine dollars in the way and manner hereinafter set out.

3. Plaintiff is the mother of Willie Blackwell, whose homicide is herein complained of.

4. At the time of the death of Willie Blackwell he was 16 years old.

5. At the time of the death of said Willie Blackwell plaintiff was dependent upon him for a support, and was entitled to the proceeds of his labor, and he had no wife or other person dependant upon him or entitled to his labor.

6. Said Willie Blackwell lived with plaintiff prior to and up to the time of his death and rendered to her constant labor and
9 service, and contributed largely to her support. He was physically and mentally sound and was active, able-bodied and willing to work and did work all the time for plaintiff.

7. His business was working on the farm for your petitioner and doing any and all kinds of work on and connected with the farm and your petitioner's home and his services at the time of his death were worth one dollar per day and would have been worth that amount on an average during the balance of his life.

8. On the 14th day of September 1913, on the Sabbath day, and about 9 o'clock P. M. said Willie Blackwell was driving a horse and buggy along the public road in said county known as Moseley's Ferry Road, the same being a road which leads from a point near

the eastern limits of the city of Elberton and continues on by Middleton and Heardmont, terminating at the W. H. Mattox Ole Homestead, and at the time of the homicide herein complained of, was crossing the Railroad of said Seaboard Air Line Railway at a public road crossing about two miles east of the Elberton station, near the home of Jim Strickland, the crossing being known as Jim Strickland's crossing, said crossing being outside of the city of Elberton.

9. While said Willie Blackwell was driving said horse and buggy across said public road crossing he was struck by the engine of defendant's passenger train No. 18, which at that time ran between Abbeville, S. C. and Atlanta, Ga., sometimes called Dixie Drummer, and due in Elberton from Atlanta at 8:54 P. M., and the wounds inflicted from which he died three days later on September the 17th, 1913.

10. Said Willie Blackwell at the time he was struck by said train was in said buggy. The buggy was entirely demolished. His left leg was crushed between the hip and the knee. His head was badly cut and the skull crushed and the brain injured. He was badly injured internally and vomited blood and also urinated blood. He was rendered unconscious and remained so until his death.

11. At the time of the homicide the train was in charge of and was being operated by Capt. Fuller as conductor and Robert Game as Engineer, and other persons constituting the regular train crew whose names are unknown to plaintiff, all of said persons being agents and employees of the defendant and operating said road for the defendant, and the negligence of said agents and employees, herein set forth, is chargeable to said defendant.

12. Said defendant and its employees in charge of said train failed to blow the engine whistle at blow post four hundred yards south of said crossing where the homicide occurred, and failed to keep blowing said whistle until the train arrived at said crossing, and said failure was negligence.

13. The defendant and its employees failed to check the speed of said train at a blow post four hundred yards south of said crossing and failed to keep checking the same until it reached said crossing, so as to stop in time should any person or thing be crossing said track on said road, and such failure was negligence.

14. The engineer and conductor in charge of said train failed to look ahead for the purpose of seeing if any person or thing was on said public road crossing, and in this they were negligent.

15. The engineer and conductor in charge of the train seeing said child and his vehicle on said crossing failed to stop the train to save his life, and in this they were negligent.

16. All the acts of negligence herein set out and other acts which will be brought in by amendment when sufficiently authenticated caused the death of said Willie Blackwell, and the damage herein set forth.

17. At the time of the homicide the train was running north, that is to say, from Atlanta to Abbeville, on its regular run and has passed Elberton.

18. Your petitioner and said Willie Blackwell were both in the ex-

ercise of ordinary care and diligence for the protection of said child, and they could not by the use of ordinary care and dili-
12 gence have prevented the consequences of the defendant's negligence.

19. Said Willie Blackwell was only 16 years of age and could not be held to as high a degree of care for his own protection as a person of mature age.

20. At the time said child was endeavoring to cross said railroad his horse became frightened at the headlight and at the moving train and stopped on the track and it was impossible for said child to get the horse to move on out of danger before he was struck.

21. Your petitioner sues for the value of the life of said Willie Blackwell, and charges that in consequence of the negligence herein named she is entitled to recover the same.

Wherefore she prays that process may issue directed to the defendant requiring it to be and appear at the next term of the city court of Elberton to be held in said county and on the second Monday in November next then and there to answer your petitioner's complaint.

PULLIAM PROFFITT,
Plaintiff's Attorney.

13 STATE OF GEORGIA,
Elbert County:

To the Sheriff of the City Court of Elberton and His Lawful Deputies, Greeting:

ELIZABETH BLACKWELL
v.
SEABOARD AIR LINE RAILWAY.

Complaint for Damages.

The defendant, the Seaboard Air Line Railway, is hereby required, personally or by attorney, to be and appear at the next city court of Elberton, to be held in and for said county on the second Monday in November next, then and there to answer plaintiff's demand in action of complaint for damages.

Witness, the Honorable George C. Grogan, Judge of said court, this 24 day of September, 1913.

W. A. RUCKER,
Clerk City Court of Elberton.

Filed in office Sept. 24th, 1913. W. A. Rucker, Clerk City Court of Elberton.

I have this day served the defendant the Seaboard Air Line Railway, by serving J. N. Wester, agent of said defendant at Elberton, Ga., personally with a copy of the within petition and process. This September 24th, 1913.

S. N. HALEY,
Sheriff City Court of Elberton.

14 In City Court of Elberton, No. 3, to Nov. Term, 1913.

ELIZABETH BLACKWELL
v.
SEABOARD AIR LINE RAILWAY.

Damages.

Now at the February term, 1914, by leave of the court, comes the plaintiff and amends the petition in said case by adding paragraph 15 (*a*) as follows, to wit:

Par. 15 (*a*). Said defendant and its agents and employees in charge of said train, in approaching said public road crossing where the homicide occurred, with said train, failed to have said train under control and failed to put the same under control so that the same could be stopped if any person or thing should be on the crossing, and they approached said crossing with said train at a high and dangerous rate of speed so that they could not stop the same in time to save the life of said Willie Blackwell who was on said crossing, and such conduct was negligence. Such conduct was negligence if they saw said deceased on the crossing, and it was negligence if they did not see him, and it was negligence under the blow post law and it was negligence regardless of the blow post law.

PULLIAM PROFFITT,
Plaintiff's Attorney.

Amendment read, allowed and ordered filed, this Feb'y the 12th, 1914.

GEO. C. GROGAN,
Judge City Court of Elberton.

Filed in office Feb'y 12th, 1914. W. A. Rucker, Clerk.

15 City Court of Elberton, November Term, 1913.

ELIZABETH BLACKWELL
v.
SEABOARD AIR LINE RAILWAY.

And now comes the defendant, Seaboard Air Line Railway, at the term of the court to which the above stated case is returnable, and reserving the right to demur to said petition, in answer to the several paragraphs of said petition, says:

1. In answer to paragraph one (1) this defendant admits that it is a corporation operating a line of railway in the State of Georgia and through the city of Elberton and having an office and agent in said county of Elbert.

2. The averments of paragraph two (2) are denied.

3. This defendant can neither admit nor deny the averments of paragraph three (3) for the want of sufficient information.

4. This defendant can neither admit nor deny the averments of paragraph four (4) for the want of sufficient information.

5. This defendant can neither admit nor deny the averments of paragraph five (5) for the want of sufficient information.

6. This defendant can neither admit nor deny the averments of paragraph six (6) for the want of sufficient information.

7. This defendant can neither admit nor deny the averments of paragraph seven (7) for the want of sufficient information.

8. This defendant can neither admit nor deny the aver-
16 ments of paragraph eight (8) for the want of sufficient information, but denies all liability on account of the occurrence therein alleged.

9. This defendant can neither admit not deny the facts detailed in paragraph nine (9) of said petition for the want of sufficient information, but denies all liability for the alleged occurrence therein set forth.

10. The averments of paragraph ten (10) are denied.

11. This defendant admits that on the day alleged it did operate a train at the time and place alleged which was in charge of Captain Fuller, as conductor, and Robert Game, as engineer, and other members of the crew who were employees of the company, constituting the crew of the train, but this defendant denies all of the other allegations of said paragraph.

12. The averments of paragraph twelve (12) are denied.

13. The averments of paragraph thirteen (13) are denied.

14. The averments of paragraph fourteen (14) are denied.

15. The averments of paragraph fifteen (15) are denied.

16. The averments of paragraph sisteen (16) are denied.

17. This defendant admits that it was running a train north from Atlanta to Abbeville, as alleged in paragraph seventeen (17), but so far as said paragraph may be construed to be any charge of liability against this defendant on account of any occurrence
17 referred to in the petition, the averments of said paragraph are denied.

18. The averments of paragraph eighteen (18) are denied.

19. The averments of paragraph nineteen (19) are denied.

20. The averments of paragraph twenty (20) are denied.

21. The averments of paragraph twenty-one (21) are denied.

22. And for further plea and answer in this behalf this defendant says that if any injuries resulted to the said Willie Blackwell they were brought about by his failure to exercise ordinary care and diligence at the time and place of the alleged injury, and this defendant is not liable in any manner to plaintiff on account of the occurrence set forth in said petition.

23. And for further plea and answer in this behalf this defendant says that in paragraph twelve (12) of said petition it is alleged as an act of negligence that the engineer in charge of the engine which is al-eged to have caused the injury complained of failed to blow the whistle of the engine at a blow post 400 yards south of the crossing where the homicide is alleged to have occurred and

failed to keep blowing said whistle until the train arrived at the crossing, and in paragraph thirteen (13) of said petition it is alleged that the employees of the defendant in charge of the engine which is alleged to have brought about the injury complained of failed to check the speed of the train at the blow post 400
18 yards south of the crossing and failed to keep checking the same until it reached the crossing so as to stop in time should any person or thing be crossing said track on said road, and such failure on the part of the employees on said train is alleged in said paragraph to be negligence. In other parts of said petition it is inferentially charged that a failure on the part of the employee in charge of the train to comply with what is known as the Blow Post Law in force in this State was negligence on the part of this defendant, and it is sought in said petition, and especially the paragraph above referred to, to charge this defendant as a matter of law in failing to have its employees comply with the provisions of said Blow Post Law. This defendant denies that the failure to comply with said Blow Post Law was negligence on its part relatively to the transaction in question.

This defendant alleges that the law above referred to as the Blow Post Law is that set forth in Sections 2675, 2676 and 2677 of the Code of this State adopted in 1910, and is in the following language:

"SEC. 2675. A post to be erected. There must be fixed on the line of said roads, and at the distance of four hundred yards from the center of each of such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check
19 and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road."

"SEC. 2676. Neglecting to erect such posts. Should any Company fail or neglect to put up said posts, the superintendent thereof shall be guilty of a misdemeanor."

"SEC. 2677. Failing to blow whistle. If any engineer neglects to blow said whistle as required, and to check the speed required, he is guilty of a misdemeanor: Provided, that within the corporate limits of the cities, towns, and villages of this State, the several railroad companies shall not be required to blow the whistle of their locomotives on approaching crossings or public roads in said corporate limits, but in lieu thereof the engineer of said locomotives shall be required to signal the approach of their trains to such crossings and public roads in said corporate limits, by tolling the bell of said locomotive; and on failure to do so, the penalties of this section shall apply to such offense."

This defendant avers that the train of defendant which is referred to in the petition as appears from the allegations of said petition was a train which ran from Atlanta in the State of Georgia to Abbeville in the State of South Carolina, and said train was used as an instrumentality of this defendant in carrying on its business as

an interstate carrier of passengers and freights between the
20 points named, and in said train were carried passengers from the State of Georgia to the State of South Carolina and other States, and baggage from points in the State of Georgia to points in the State of South Carolina and other States, and upon said train also the Southern Express Company under a contract with this defendant carried articles of freight between Atlanta and other points in the State of Georgia, to Abbeville and other points in the State of South Carolina, and other points in other States, and upon said train were also carried the mails of the United States, and the train in question was actually engaged in commerce between the several States, and especially between the State of Georgia and the State of South Carolina. This defendant avers that the line of this defendant over which said train was operated ran from the city of Atlanta, in the State of Georgia, to and over the Savannah river, which is the boundary line between the State of Georgia and the State of South Carolina, and thence to the city of Abbeville, in the State of South Carolina, and thence to other points in the States of North Carolina and Virginia. This defendant alleges that between the city of Atlanta, in the State of Georgia, and the Savannah river, where the same is the boundary line of the State of Georgia, there are one hundred and twenty-four (124) points where the line of this defendant crosses public roads of the different counties of this
21 State, established pursuant to law, and all of such crossings are at grade. This defendant alleges that the distance from the city of Atlanta to the line of the State at the Savannah river traversed by the line of railway of this defendant is one hundred and twenty-three (123) miles.

This defendant alleges that according to the provisions of said Blow Post Law above set forth, it is required of the engineer in charge of railway trains to begin to check the train at a point 400 yards from each road crossing and to continue to check during the time that said 400 yards is being traversed, and have the engine under such control at the crossing that if any person or thing shall be upon the crossing it shall be in the power of the engineer to stop the train before it passes the crossing. This defendant avers that in order to comply with said law it will be necessary for the engineer in charge of the train to so slacken the speed of the train that there would be practically a full stop of the train at each of the road crossings over which the line of railway was constructed. This defendant avers that the time that would be required to so check and slacken the speed of the train and then after the crossing was passed to increase the speed to the rate at which the train was running, would depend upon various conditions that might or might not exist at the time and at the crossings, such as the weight of the train, the state of the weather as affecting the condition of the rail, and
22 the per cent. of the grade. This defendant avers that to comply with said law relatively to a train composed of an engine and three cars, consisting of a mail car and two coaches or similar cars, the time consumed in checking and slackening speed and increasing speed after the crossing was passed would not be less than

three (3) minutes, and that if the train was composed of a larger number of cars the time consumed would be greater. This defendant avers that this allegation as to the time consumed in complying with such law at each crossing is based upon ordinary conditions; that is, where there is no grade, or the percentage of grade is low, where the conditions of the weather are such as not to affect the track, and all conditions are usual and ordinary. This defendant avers that where the grade is heavy or great and the track is affected by the weather, the time consumed would be greater. This defendant avers that a train composed of an engine and freight cars, being ordinarily a longer train than a passenger train, the time consumed in complying with said law at each crossing with the average freight train would be not less than five minutes. This defendant avers that the train referred to in the petition, which is alleged to have caused the injury complained of was a train composed of an engine, a mail car and two coaches: that is to say, a train composed of an engine and three ordinary coaches, and this defendant avers
23 that if the provisions of the Blow Post Law above set forth had been complied with on the day in question from the time that said train left Atlanta in the State of Georgia until it reached the Savannah River, the boundary line of the State, that at least three minutes would have been consumed at each crossing in complying with said Blow Post Law, and that the time consumed in compliance with said law on the day in question between the city of Atlanta and the Savannah River would have been more than six hours. This defendant alleges that according to the adopted schedule of said train the time consumed in running from the city of Atlanta to the Savannah River was four hours and thirty minutes, and this schedule was operated by giving a signal from the whistle of the engine on the approach to each crossing, but not checking and slackening speed in approaching the crossing, and that if said law had been complied with the time consumed in operating the train from the city of Atlanta to the Savannah river would have been more than ten hours and a half.

This defendant further avers that the maximum rate of speed for freight trains upon the line of this defendant is twenty miles an hour, and that if law was complied with in the operation of freight trains between the city of Atlanta and the Savannah river, the time consumed in complying with said law at the public road crossing would be ten hours or more, and the time consumed in oper-
24 rating a freight train between the city of Atlanta and the Savannah river would be more than sixteen hours.

This defendant further alleges that the 124 public crossings above referred to are the usual and ordinary grade crossings, and there is nothing in the conditions — surroundings which makes any one of them peculiarly dangerous other than such danger as may result from the crossing of a public road by a railroad track at grade.

This defendant further alleges that between the city of Atlanta and the Savannah River the line of railway of this defendant crosses the tracks of two other railroads, and that under the laws of this State wherever one railroad track crosses another, the engineer in charge

of the train is required to bring his train to a full stop fifty feet from the crossing, and that the time consumed in such crossings would increase the time required to operate the trains between the points above referred to.

This defendant alleges that the Blow Post Law above referred to, in so far as it requires the engineer in charge of trains to begin to check his train at a point 400 yards from the crossing and to keep checking until the crossing is reached and have his train under such control that the same can be stopped if there should be any person or thing upon said track at said crossing, is as applied to the train in question which is alleged to have brought about the injury complained of a regulation of Interstate Commerce and an unreasonable regulation of such commerce, and is in violation of paragraph three, section eight, article one, of the Constitution of the United States, which declared, "The Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes", which confers upon Congress the exclusive power to regulate the commerce among the several States, and said Blow Post Law is as applied to the train in question null and void.

Wherefore, this defendant says that each and every allegation of said petition which charges this defendant with negligence in failing to comply with said law, and especially paragraph- twelve and thirteen of said petition, set forth no act which would in law amount to negligence, and this defendant alleges that it is not guilty of any negligence under the facts so alleged and is not liable to plaintiff on account of its failure to comply with the provisions of said Blow Post Law, and all of this said defendant is ready to verify.

COBB & ERWIN,
F. C. SHACKELFORD,
Z. B. ROGERS,
H. J. BREWER,
Attorneys for Defendant.

Filed in office Nov. 10th, 1913 W. A. Rucker, Clerk.

In City Court of Elberton to November Term, 1913.

No. 3.

ELIZABETH BLACKWELL
v.
SEABOARD AIR LINE RAILWAY.

Complaint for Damages.

Now at the first term of said case, comes the plaintiff and demurs to the twenty-third paragraph of defendant's answer and moves to strike the same because the same fails, and is insufficient to set up

any legal defense against the cause of action set out in plaintiff's petition.

PULLIAM PROFFITT,
Plaintiff's Attorney.

Ordered that the foregoing demurrer be allowed and filed.
This Nov. the 10th, 1913.

GEO. C. GROGAN,
Judge City Court of Elberton.

GEORGIA,
Elbert County:

In the City Court of Elberton, November Term, 1913.

Ordered that the foregoing demurrer be set for a hearing in vacation at Elberton on January the 24th, 1914.
Signed this November the 10th, 1913.

GEO. C. GROGAN,
Judge City Court of Elberton.

Filed in office Nov. 10, 1913. W. A. Rucker, Clerk.

27 In the City Court of Elberton, to November Term, 1913.

No. 3.

ELIZABETH BLACKWELL
v.
SEABOARD AIR LINE RY. CO.

By proper order passed in term the demurrer to Par. 23 of the defendant's plea should be heard in vacation, and the same was heard on this date.
Upon the hearing of said demurrer, it is adjudged and ordered that the demurrer be sustained in so far as to strike all of Par. 23 of the plea of defendant except so much as reads as follows: "This defendant denies that the failure to comply with said blow post law was negligence on its part relatively to the transaction in question."
This Jan. 24, 1914.

GEO. C. GROGAN,
Judge City Court of Elberton.

Filed in office Jan'y 26th, 1914. W. A. Rucker, Clerk.

28 In the City Court of Elberton, November Term, 1913.

ELIZABETH BLACKWELL
v.
SEABOARD AIR LINE RAILWAY.

Suit for Damages.

GEORGIA,
Elbert County:

Be it remembered that at the November term, 1913, of the city court of Elberton, in which the above stated case is pending, an order was taken providing for the hearing in vacation of a demurrer filed by the plaintiff to the defendant's answer in said case, and that in pursuance of said order said demurrer came on to be heard in vacation before Honorable George C. Grogan, Judge of the city court of Elberton presiding, on the 24th day of January, 1914, and after hearing argument the Judge sustained said demurrer as to part of Paragraph 23 of the defendant's answer and thereupon passed the following order, to wit:

"By proper order passed in term the demurrer to Paragraph 23 of the defendant's plea should be heard in vacation, and the same was heard on this date;

Upon the hearing of said demurrer it is adjudged and ordered that the demurrer be sustained in so far as to strike all of Paragraph 23 of the plea of defendant except so much as reads as follows: "This defendant denies that the failure to comply with said blow post law was negligence on its part relatively to the transaction in question."

29 This January 24, 1914.

GEO. C. GROGAN,
Judge City Court of Elberton.

To the ruling and order of the Judge sustaining the plaintiff's demurrer as hereinbefore set forth the defendant, the Seaboard Air Line Railway, excepted and here and now excepts and assigns the same as error.

And now within thirty days from the time said ruling and order was made comes the defendant, Seaboard Air Line Railway, and presents this its bill of exceptions pendente lite and prays that the same may be certified by the court and entered upon the minutes of the city court of Elberton.

H. J. BREWER,
Z. B. ROGERS,
F. C. SHACKELFORD,
COBB & ERWIN,
Attorneys for Seaboard Air Line Railway.

The foregoing bill of exceptions pendente lite read and considered. The same is hereby approved, and the recitals of fact therein contained are certified as true.

Ordered that said exceptions pendente lite and this certificate be entered upon the minutes of the city court of Elberton.
This 3 day of February, 1914.

GEO. C. GROGAN,
Judge City Court of Elberton.

Filed in office Feb. 3rd, 1914. W. A. Rucker, Clerk.

30 In City Court of Elberton. February Term, 1914.

ELIZABETH BLACKWELL
v.
SEABOARD AIR LINE RAILWAY.

Verdict and judgment for plaintiff at February term, 1914, of city court of Elberton on 13 day of Feb'y, 1914.
The defendant being dissatisfied with the verdict and judgment in said case, comes during said term of the court, before the adjournment thereof, and within 30 days from said trial, and moves the court for a new trial, upon the following grounds, to wit:
1st. Because the verdict is contrary to evidence and without evidence to support it.
2d. Because the verdict is decidedly and strongly against the weight of evidence.
3d. Because the verdict is contrary to law and the principles of justice and equity.
Whereupon he prays that these, his grounds, for a new trial, be inquired of by the court, and that a new trial be granted him.

COBB & ERWIN,
F. C. SHACKELFORD,
H. J. BREWER,
Z. B. ROGERS,
Attorneys for Movant.

Read and considered. The recital of fact contained in the several grounds of the motion are full and correct. It is ordered
31 that the plaintiff, Elizabeth Blackwell, show cause before me at Elberton, Ga., at noon on the 14th day of Feb'y, 1914, why the foregoing motion should not be granted. It is further ordered that the plaintiff, Elizabeth Blackwell, be served with a copy of this motion and order, and that this order act as a supersedeas until the further order of the court. This 13 day of Feb'y, 1914.

GEO. C. GROGAN,
Judge of City Court of Elberton.

ELIZABETH BLACKWELL
v.
SEABOARD AIR LINE RY.

Verdict and judgment for plaintiff Feb'y term, 1914, of city court of Elberton.

The defendant having made a motion for a new trial in said case, on the grounds therein stated, and said grounds having been approved by the court, and it appearing that it is impossible to make out and complete a brief of the testimony in said case before adjournment of court; it is ordered by the court that said motion be heard and determined on the 23 day of Feb'y, in vacation at Elberton, Ga., and that movant may amend said motion at any time before the final hearing.

If for any reason said motion is not heard and determined at the time and place above fixed, it is ordered that the same
32 shall be heard and determined at such time and place in vacation as counsel may agree upon, and upon failure to agree, then at such time and place as the presiding judge may fix on the application of either party, of which time and place the opposite party shall have at least five days' notice.

It is further ordered that the movant have until the hearing, whenever it may be, to prepare and present for approval a brief of the evidence in said case, and the presiding judge may enter his approval thereon at any time, either in term or vacation, and if the hearing of the motion shall be in vacation, and the brief of evidence had not been filed in the clerk's office before the date of the hearing, said brief of evidence may be filed in the clerk's office at any time within ten days after the motion is heard and determined. This 13 day of Feb'y, 1914.

GEO. C. GROGAN,
Judge of City Court of Elberton.

Filed in office Feb'y 13, 1914. W. A. Rucker, Clerk.

Due and legal service of the within motion and order acknowledged, time, copy, and all other and further service waived. This 13 day of Feb'y, 1914.

P. P. PROFFITT,
Attorney for Plaintiff, Elizabeth Blackwell.

33 In the City Court of Elberton, Tried at February Term, 1914.

ELIZABETH BLACKWELL
v.
SEABOARD AIR LINE RAILWAY.

Accusation for Damages.

Brief of Evidence.

J. W. HARRIS sworn for plaintiff:

I am operator for the S. A. L. Railway at Elberton, Georgia, and held that position on the 14th day of September, 1913. I was down there at the Seaboard passenger station that night. There was a train that ran on the Seaboard known as train No. 18 at that time. It is a passenger train, and is sometimes called the Dixie Drummer. The schedule time for that train to arrive in Elberton at that date was eight fifty-four o'clock P. M. That was the train running north. I don't remember exactly, but it was somewhere near on time. So far as I know it left on time. Captain Game was running that train or some other train on the Seaboard at that time. The conductor in charge of that train that night was Captain Fuller. The train left the depot on time that night, so far as I remember. I saw something more of that train that night. After being gone 25 or 30 minutes it backed into the station carrying two regular passenger cars, one baggage car and the locomotive. It came back because the conductor said he struck some one and had brought him back to leave him there. They took the man off the train and left him in the colored waiting room. They
34 called for medical attention for him. I called Dr. Oliver and he came and took charge of the injured man. The conductor did not tell me where he was injured at. I think he notified the Superintendent's office either by phone or letter. The boy remained in the station until the doctor came. I do not remember how long it was. When the doctor came he was carried away.

Dr. A. S. OLIVER, sworn for plaintiff:

I am a physician. On the night of September 14, 1913, I was called by the Seaboard authorities professionally to the passenger station at Elberton to see a man who had been hurt, my recollection is that the conductor called me up. I was in bed when the phone rang. "He says, "Fuller, a Seaboard Air Line man, wants you to come over to the Seaboard station and see a man hurt." I said, "How bad is he hurt?" I dressed and went by my office to get my instruments and in the meantime I went by to get Dr. Moore to go with me, for I thought that I might need help in case I had to administer anæsthetics. I went down there with Mr. Moore with me. I found someone there injured. He was in, I think,

the colored waiting room of the Seaboard passenger station. He was the person to whom I ministered. I had him moved from there down to a negro house. I think it was to the house of Millie Blackwell. It was somewhere between three and four hundred yards from the depot. There were four boys around there, and I said get a litter and let's carry him to the house. I had him carried to a cottage. There was a cut across the back of his head about four inches long. I am satisfied that the skull was cracked. There was an injury to the face and head. He was rendered unconscious and was bleeding copiously. The left leg was broken about one-third or one-half the way between the knee and hip joint. He lived about three days I think and died. He did not regain consciousness. I think the injuries I have described killed him. He appeared otherwise than this injury to be a healthy boy. I gave him proper treatment. I have been practicing since 1879.

JUNE MOORE, sworn for plaintiff:

I remember the time but not the date Willie Blackwell lost his life. I was at the depot that night. I was not there when the train came back with the boy. I came there afterwards. I heard the train coming back and I went back to see what was the matter. The boy was Willie Blackwell. He was bruised up considerably. He was hurt. When I saw him he was outside the depot on the sidewalk. Me and John Henry Wall and two railroad men carried him away from there. We carried him down to his grandmother's house. That was Willie Blackwell. I believe Dr. Oliver and Dr. Moore said "Boys, take him and carry him down to his grandmother's." I saw him before he died and after he was dead.

JOHN HENRY WALL, sworn for plaintiff:

I knew Willie Blackwell. I saw him on the night of September 14, 1913. When I saw him they were taking him off the train. It was the train that was due here about nine o'clock at night. I just saw them taking him off the train. When the train first came in that night I was at the depot. This boy, Willie Blackwell, was not there then. The train went on and I stayed there a little while and directly it came back. When it came back to the depot they took the boy off the train. They took him on a stretcher and carried him to the waiting room. He seemed to be hurt pretty badly. I saw Drs. Moore and Oliver come and take charge of him. They carried him to the home of Millie Blackwell. We took him on the stretcher down the railroad to her house. That was Willie Blackwell. He was Rebecca Blackwell's boy so far as I know. I helped the doctors dress his wounds that night. I did not see him after that night. That train was gone before it came back that night some little time.

ROBERT BLACKWELL, sworn for plaintiff:

The plaintiff in this case is my wife. Willie Blackwell was my son. He was 16 years old. I saw him after he was injured and after he was dead. I saw him that night. He

was not conscious when I saw him. He did not know me at all. I saw him after he was dead. I saw him on that day before he was injured. He made a trip that afternoon up here to Carter Cade's house. He rode in a buggy and drove a horse. He carried Carter Cade's wife home. I know the place called Strickland's crossing. That crossing is about two miles from the Seaboard depot. It is east of Elberton. In making that trip he had to cross that crossing. That was on his route. When he left on that trip he never came back home. He was never at home after that. I came by that crossing that night as I came to town after I heard that he was hurt. That buggy never got back home, it is down there at the crossing now. It was all torn to pieces. The horse was about one quarter of a mile down in the field. Part of the buggy was on the crossing, two pieces of the wheel and some spokes; and all of it was lying at the crossing. The main part of the buggy was lying off to one side and some of the spokes were lying down between the tracks when we got up there. It did not hurt the horse, but tore the harness all off of him. Before the boy was hurt he was able to work, and he did work. My wife got the benefit of his labor. She farms and he worked for her. He plowed and did other farm work. I had nothing
38 to do with their farming. She has been farming two or three years. I have nothing to do with the farm. That was how they made their living, he worked with her on the farm. His services were worth about $1 per day. I guess he would have been worth more than that as he got older, according to what kind of a trade he had.

Cross-examination by Mr. Erwin:

My wife ran a farm and I had nothing to do with it. She lived there and I stayed with her. She made the rent contract. She rented from Mr. Smith. She traded with Hammond Bros. at Middleton. She carried her own crop to these merchants at Middleton, and she *used* what they bought. She raised cotton and corn. She sold this produce in her own name, I had nothing to do with it at all. I didn't get any of the money and I did not furnish her anything. I was working with Mr. Hudgens to get out of debt. She did her own work. That has been the way all the time, I had not given her anything for years before this. I have supported her. She had been farming two or three years. Before she had attended to her own business. I fed her when she was here in town, but I have been in trouble and I am trying to work it out with Mr. Hudgens. I fed her until she went to farming. Before she went to farming I fed and clothed her.

Redirect:

I consented for my wife to run her own business and I agreed for this boy to work for her. I agreed for her to have the
39 proceeds of her own and this boy's labor. Previous to the time she went to farming she worked. She used the money for herself and children.

Recross:

This boy did nothing but work on the farm. I agreed for my wife to have what the boy made ever since he was big enough to work. He worked for Mr. Hudgens sometimes for a day or two at a time, and his mother got his wages.

ELIZABETH BLACKWELL, sworn for plaintiff:

I am the plaintiff in this case. My name is Elizabeth Blackwell. Willie Blackwell was my boy. He was sixteen years old. That was his age at the time he was injured. He was sixteen sometime in June last year. He worked for me before he got hurt. I got all of the proceeds of his labor. I worked him on the farm all the time for the past two or three years. I hired him out to Mr. John Bonds one year. When he was hired out I got his wages. He worked on the farm most of the time for the two years 1912 and 1913. It was 1911 that he worked for Mr. Bond. I received all of his wages during the years 1911, 1912 and 1913. He was a good boy to work. I hired him out last year after we got through with the farm work in the summer at $1 per day. He worked
40 some for Mr. Hudgens and some for a man across the creek. I hired him out to the man across the creek and got one dollar per day. I got the money he made. My husband consented for me to farm on my own account, he agreed for me to use this boy and get the proceeds of his labor. He agreed for me to hire him out and get the proceeds of his labor. On the day the injury occurred he made a trip. He brought Betsey Cade to town. He was in my buggy and drove a horse. I know where Strickland's crossing is. That crossing was on the way from my house to where he was going. I sent him to town. He never came back. After he was hurt I saw him, and after he was dead I saw him. I passed that crossing after he got hurt that night. I saw my buggy, it was torn all to pieces. We have never tried to do anything with it. It is not in a condition that anything could have been done with it. The buggy was not very far from the crossing, I do not know how far. There were some pieces of the buggy between the tracks on the crossing. That was my boy that died at Mille Blackwell's, she was his grandmother. I went there after he was hurt and attended him there after he was injured. I saw him that night after he was injured. Strickland's crossing is about two miles from the passenger station I guess. It is between Elberton and the Savannah River.

Cross:

I live about two miles from Strickland's crossing. I live
41 five miles from town. It is three miles from my house to the crossing I guess. Willie came to town only when I sent him. I sent him occasionally. He was a bright, intelligent boy. I live near enough to the railroad to hear the trains. The four-mile post from Elberton is right across the field from my house. I live a mile across the field from the railroad, a mile from the railroad track. I lived in Elberton until six years ago. This boy had been

home all day except when I sent him off that evening. When I lived in Elberton I lived in Mr. Will Burch's house right at the railroad for eight years. About fifty feet from the track. I and my children could see the train from my house.

Redirect:

Strickland's crossing is two miles from town, then it was two miles to where I turn from the railroad to go home and I live a mile from the railroad, that makes it three miles.

JOE FORTSON, sworn for the plaintiff:

My name is Joe Fortson. I know Strickland's crossing. They call it about a mile and a half from the depot at Elberton. It is between Elberton and the Savannah River. I live near the crossing. There is one blow post this side of my house. There is another one a little this side of the crossing, I know where the blow post
42 is where they blow for that crossing. That is not two hundred yards from my house. I live the other side of that blow post. I live between the blow post and the crossing. I am closer to the crossing than the blow post is. Between the blow post and the crossing it is straight and on a slight fill. I can hear the train from my house. My house is between twenty-five and thirty steps from the railroad track. On the night when this boy was injured, I recollect the occasion, but do not the exact date. The next morning I heard about his being injured. I remember when that train went along on its way north before the injury. It was running fast. It was running like it generally runs anywhere on the line. I have lived there a little over a year. Before that I lived back of the cemetery at Elberton. I have had an opportunity to see trains running. It was running right along. It did not blow the whistle between the blow post and the crossing.

Cross:

I never heard this train blow the whistle as it passed my house on the night of the 15th of September, 1913. I do not know whether it blew on the 12th of September. I do not know whether it blew on the 16th. I remember it did not blow on the 14th because I was sitting up that night. Sometimes I hear it blow. When I am sitting up I hear it blow. I can swear positively that it did not blow
43 that night. I was listening for it. I did not learn of the accident that night. When the train passed I was setting up. I was sitting by the fire. It was not so very clear that night.

Redirect:

After I stopped I did not hear it holler any more. It blows up there above my house at the hollering post. That train never blows between that blow post and the crossing.

ADDIE FORTSON, sworn for plaintiff:

Joe Fortson is my husband. I remember that night that Willie Blackwell was killed. The train passed my house that night. I heard it going down but did not hear it whoop. I know where the blow post is for that crossing. I did not hear the whistle blow between that blow post and the crossing. I was up and awake. I would have heard it if it had blown. I have been hearing it. I did not hear it that night. I was up and heard the rattling of the train as it passed, but did not hear it blow. I heard it stop. I heard it blow for brakes down there. After it got to the crossing I heard it pass back towards town. I heard it pass back towards the north. It looked like it was running pretty fast. I have been in the habit of seeing trains run.

44 ELIZA STRICKLAND, sworn for paintiff:

My name is Eliza Strickland. I live right there at Strickland's crossing. I remember the night Willie Blackwell was hurt. That night I was at home. I heard of his being hurt. Jim was at home that night. I heard the train coming just like it always does that night. It did not stop until it got down below my home. After it stopped down there it backed this way to the crossing and it stopped there. I saw the people leaving the train there at the crossing. I saw them pick something up. The train came back towards Elberton. It was running just like it always runs anywhere. Just like it always generally runs. I have seen passenger trains run at all rates of speed at other places. I have seen them running at low and at high speed. This train seemed to be running very fast. They were not blowing the whistle. I know where the blow post is this side of the crossing about four hundred yards. I do not remember any blowing down between that post and the crossing. I could hear the train rattling. If it had blown I could have heard it. I did not hear it.

Cross:

I live right on the track. I have lived there for the last four years. I am accustomed to hearing the train. When it blows I always generally hear it. It did not blow there that night near my
45 home. I do not know about any other night. My husband called my attention to it.

Recross:

(Counsel for defendant presented photo.)

That looks like the house. I live on the right of the railroad going towards S. C. I live across the railroad from that crossing sign.

JIM STRICKLAND, sworn for the plaintiff:

(Counsel reads description of road in the declaration.)

I know that road. That road crosses the S. A. L. Railroad. I live somewhere near eighty-five or one hundred yards to the crossing.

Eliza Strickland is my wife. I have known that dirt road ever since I was a boy. I am fifty-three years old. The public have been working and keeping up that road. The public traveled it. It has been worked and traveled by the public more than twenty years. That road crosses the Seaboard near my house. The description of that road has been read correct. I remember about the time Willie Blackwell got hurt. I was at home that night. I know what we call the nine o'clock train. It passes my house about nine P. M. going north. I heard that train pass my house and this crossing that night. It stopped just below my house about two hundred yards below the crossing. It backed to the crossing, stopped right this side of
46 the crossing. It stopped and some people got out with some lights and were looking around there and seemed to pick up something. The light was so bright from the locomotive that I could not see well. They *they* came on back towards Elberton. Compared with the direction it had come down towards my house it was in the opposite direction. I heard that train that night as they went back north. Before they stopped I heard the train. It seemed to be running pretty fast. I know where the blow post is for that crossing. They did not blow any whistle between the blow post and this crossing as they first went by that I heard. I was in bed. I could have heard the whistle if it had been blowing. Sometimes they blow the whistle and I do not pay any attention to it. If I heard it I did not pay any attention to it. Between the blow post and the crossing it is straight. It is pretty well on a level, there is a little fill between the blow post and the crossing. I think you can see the blow post from the crossing. You can see the crossing from the blow post. I saw a buggy torn up after they had come back towards town. It is still here. It is torn up pretty badly. It was torn all to pieces. The buggy is about fifty yards from the crossing, I reckon. It is right close, ten or fifteen feet from the railroad tracks. Some pieces of the buggy were on the track of the railroad on the crossing.

Cross:

When I first saw the train it was backing back. I went to
47 the door, but did not go down to the crossing. I went out near the railroad, but not to the crossing.

(Certificate of E. A. Cason, Clerk of the Commissioners of the roads and revenues of Elbert County from the registry of roads as to Mosley's Ferry road bearing date of January 13th, 1914, admitted in evidence.)

SUSAN MORRISON, sworn for plaintiff:

My name is Susan Morrison. I live this side of Strickland's crossing from where this boy was hurt. I know where the blow post for that crossing is. I know where the blow post near Joe Fortson's house is. I heard the rattle of the train as it went by my house that night. It was running in full speed by me. It did not blow between the blow post and crossing. I just heard the train running. I do not know whether it blew at the blow post or not, if it did I did not

hear it. I heard about this boy being hurt next morning. I heard the train stop up there about the crossing. I heard it stop and got up and looked at it. I heard the train leaving after the boy was hurt, the train came back towards Elberton.

Redirect:

I saw the train stop at the crossing and come back towards
48 town that night. I heard about the boy being hurt next morning.

ABE FOSTER, sworn for plaintiff:

I know Willie Blackwell. I remember the night he got killed. The last time I saw him before he got hurt was between eight and nine o'clock that night. I came down the street from west end with him in a buggy. When I was with him he was going towards home. I came with him from near Judge Worley's residence to the station. That is about a mile. I got out at the depot and he went on towards home. It was somewhere between eight and nine o'clock, not long till the train was due. When I left the boy I went on down the street, in a few minutes someone said that he was killed. Assuming that that train was due at 8:54 he could have had time to get down to Strickland's crossing before the train would have got there. He was sober. He seemed to be just as he had always been since I knew him.

(Plaintiff introduced in evidence the Carlysle Table as same appear page 845, volume 70 of the Supreme Court Reports of Georgia.)

R. G. GAME, sworn for defendant:

I am a railroad engineer with the Seaboard Air Line. I came here on February 6, '91. I had been an engineer prior to that time about three years, altogether twenty-seven years. I was
49 in their service on September, 1913. I was on train No. 17 and 18 between Abbeville and Atlanta. No. 18 is the north bound train from Atlanta to Abbeville. I was engineer on that train on September 14, 1913. I do not know that the engine struck a boy that night. He came up on the track about three hundred feet ahead of me. Just as he got on the track he looked up at me, but I did not see the engine strike him. He came up on the right side. I was on that side. It was night about 9.20 P. M. We left Elberton twenty-one minutes late. My fireman was Jim Conwell, colored. I do not know where he is now. I do not know whether he is in the employ of the Seaboard now. I have no information as to where he is. He was on that night in place of my regular fireman, and I have seen him only one time since. I had an electric headlight. It was burning. It is a strong headlight. When I first saw this negro boy he seemed to be leaning forward with his head down. Just as the buggy came on the track he turned and looked towards the engine. I applied the emergency brakes and did all I could to keep from striking him. I ran four hundred feet beyond the place where I struck him before stopping. At the

rate I was running the shortest distance in which I could stop was about seven hundred feet. I made a good stop, all I could do. I did not know he was approaching the crossing before I saw him on the crossing. The place at which he was struck was on a
50 straight track. It is straight for half a mile back towards Elberton. If any one had been approaching that crossing he could have seen a train approaching in the direction my train was coming five-eight-s of a mile easily, and he could have seen the light further. There are two small cuts in there I think. One small cut towards Elberton about fifteen hundred feet. Except those the track is absolutely level. One of the cuts was two or three feet and the other three or four feet. The engine is fourteen and one-half feet high. There is no other cut between the one I mention and the crossing. This photo (presenting the same photo) is a correct representation. Yes, that is the crossing al- right. I was going from Elberton. I was on the right side. He came up right here on the right side. On the opposite side from the railroad crossing sign. He came from the direction in which the buggy is standing. The dirt goes up alongside the track then turns two hundred yards away and then comes back to the track again. The train would not get out of view of one coming along this road. There was nothing there to obstruct the view. Approaching that crossing that night I blew the crossing signal and the bell was ringing. My conductor was Fuller. We picked the boy up and brought him back to Elberton and put him in charge of Dr. Oliver. Some white boys said his name was Willie Blackwell. That is a
51 straight track. The headlight from the engine shone as I approached that crossing right down the track.

Cross-examination:

You could stop such a train as that on this track running thirty miles an hour with the locomotive in approximately four hundred feet. Running thirty-five miles per hour I should say six hundred feet. When running at forty miles per hour I should say from six fifty to seven hundred feet. In running at twenty-five miles per hour, probably three hundred and seventy-five feet. I am doing some long-distance guessing for you. When running twenty miles per hour, probably two hundred and fifty feet. If running five miles per hour in approximately fifty feet. In running ten miles per hour, probably two hundred feet. I said just now that I blew the crossing signal, this was the signal at the blow post. I said the bell was ringing automatically. The air pressure causes the ringing. I ring the bell at road crossings because of the law and rules. Our rule book has that in it. I ring at all crossings. It was ringing at the blow post, and from there to the crossing. Each swing was about one second apart.

Captain G. W. Fuller, sworn for defendant:

My name is G. W. Fuller. I am conductor with the Sea-
52 board. I was with them as conductor in September, 1913, on train No. 18. I was conductor on the train on which

Captain Game was engineer. I remember the 14th of September, 1913. I knew nothing about the accident except after it occurred. I was in the train, about the middle, when it occurred. As to any signals being given as the train approached that crossing, I was busy and cannot swear. I was taking up tickets. As that train approached the crossing I cannot recall whether the — was ringing or not.

Z. B. ROGERS, sworn for defendant:

I am familiar with this crossing. This photo (presenting same photo) is correct. I was present and showed the photographer how to make it. That is a straight track as shown. After crossing the Elberton and Eastern railroad this dirt road runs down the Seaboard track and turns off and goes up a hill. Joe Fortson lives there. It is not fifty feet from the railway. This buggy is in the road. The crossing you see in the distance is the McLanahan Crossing. It is this side of the cut back there. To that cut from this crossing there are eleven telegraph poles about one hundred feet apart. I think the track is perfectly straight from there. There is nothing to prevent one coming along this way from seeing the whole train.

I should think that the top of the train could be seen over
53 that cut eleven or twelve hundred feet from the crossing.

Jim Strickland's house cannot be seen in this picture. It is just outside. From the curve at the crossing on the same side the buggy is on it is about one hundred yards to Jim's house.

Cross-examination:

The instrument when this picture was made was about eighteen or twenty cross-ties from the crossing, some twenty-eight or thirty feet. We were between Jim's house and the crossing. If you mean in a straight line, I think we were. This post (indicating on photo) is some ten feet, I guess, from the railway. When he was up here and the train was at the blow post I do not know whether this hill interfered with his view. There is a little hill where Joe Forston lives. I do not know where the blow post is. If the train was behind the hill, it would cut off the view, but I do not think it would prevent seeing the train, and certainly not the headlight. I know where Joe Forston lives. He is on the hill. One coming around there would not be able to see a train here so well. From the crossing to the cut it is eleven or twelve hundred feet. There are eleven telegraph posts. There are eleven shown on this photo.

Redirect:

The hill where that cut is would not obstruct the view. There
is eleven hundred, at least, feet there with nothing to ob-
54 struct the view.

Recross:

If the blow post was in the cut it would be 1,100 feet from the crossing. I do not know that I ever counted the poles except in the

picture. I was looking through the instrument when the picture was made.

GAME, recalled:
This train had been running on this schedule from November 17th, 1912. The fireman was on the left side of the engine, that was the side opposite the direction from which this boy came. The boy went off the track on the side the fireman was on.

Cross:

When the boy looked towards the engine I was possibly two hundred and fifty feet from him. When I first saw him I was about three hundred feet away. When he looked at me the buggy was possibly about the middle of the track. When he looked at me he began jerking his arms as though trying to urge the horse on. The horse was moving. When the boy jerked he appeared to me to get slower. I was so anxious for him to get off the track.

Mr. Erwin, attorney for defendant, stated in his place as an attorney, that Jim Conwell is no longer in the employ of the
55 Company. The Company has tried to get him here for this trial. Photograph put in evidence.
Defense Closed.

JOE FORSTON, recalled by plaintiff:
The railroad is lower than my house. There is a cut by my house. It is deeper than a man's head. It is hardly as deep as a railroad coach. That is the first cut this side of the crossing. With reference to the cut the blow post is most on this end of it. I would estimate the distance from the blow post to the crossing to be more than four hundred feet I think. If a man was driving along past my house and was approaching that crossing, if he looked back down this way to see a train before it got to that blow post, he could not see it.

Cross:

If he was below my house I do not think he could see a train coming from towards Elberton. It would be under the hill. I did not see this picture this morning. A man driving here, the hill down there before you come to the crossing would hinder him from seeing a train coming towards him from Elberton. I do not know where it is, I think it is below John Bank's house. I do not know where that is on this picture. I can't see into that picture
56 nohow captain. It might be more than four hundred yards from the crossing to the cut, I do not know. The blow post is set in the cut.

Redirect:

I do not think he could see the train down here towards Elberton. The hill that would keep him from seeing it is the hill along there

by my house. If there was any bell ringing on that train that night, I do not know, I did not hear it.

Recross:

As to whether the bell was ringing or I just failed to hear it, I do not know.

Redirect:

I could have heard it if it had been ringing. I did not hear it.

Recross:

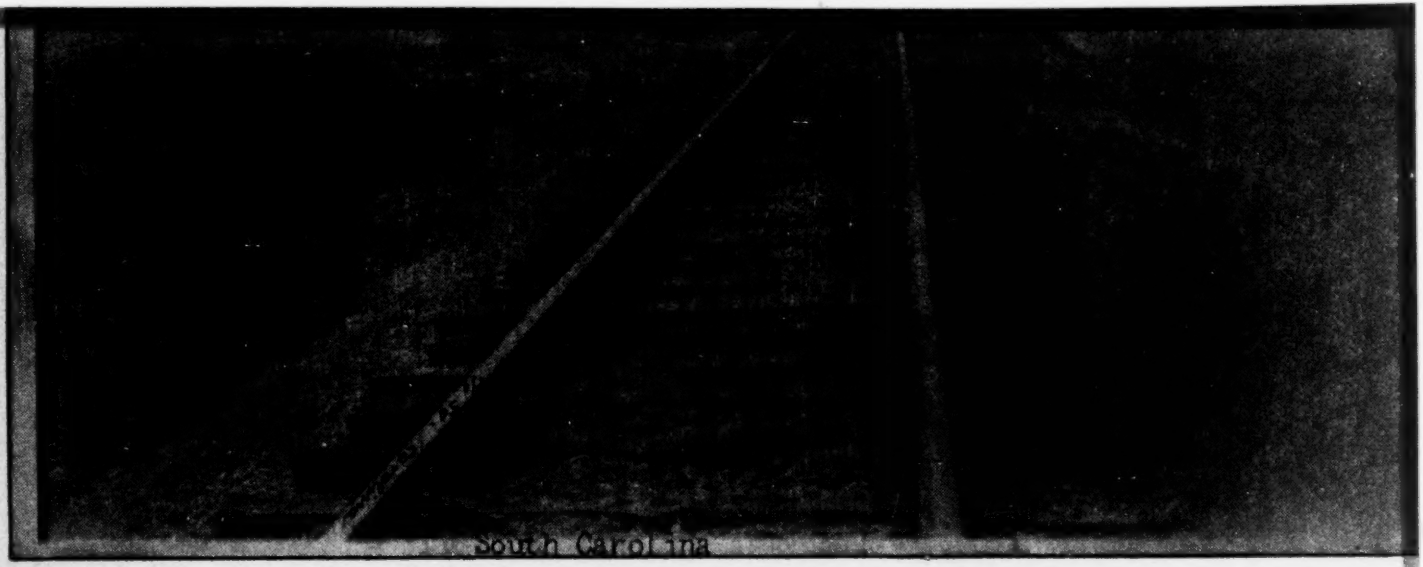
If I had not been paying any attention I do not know whether I would have heard it or not.

JIM STRICKLAND, recalled by plaintiff:

What first attracted my attention to that train, I noticed it as it slowed up passing my house. I very often hear it.

Plaintiff closed.

(Here follows diagram marked page 57.)



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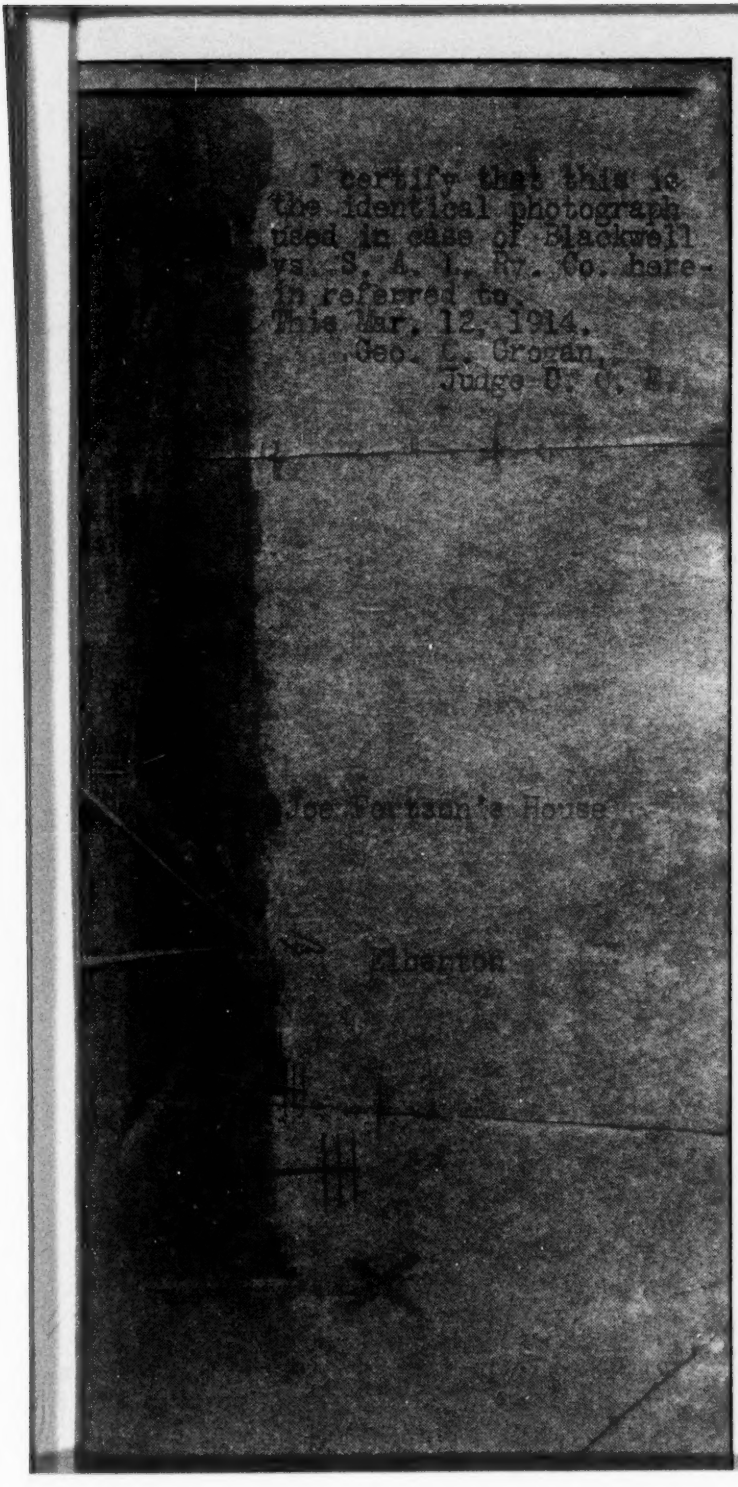
I certify that this is the identical photograph used in case of Blackwell vs. S. A. L. Ry. Co. herein referred to.
This Mar. 12, 1914.
Geo. L. Grogan,
Judge U. C. R.
Joe Fortson's House
Abington

58 The within brief of evidence is approved as a correct brief of the evidence adduced on the trial of the case of Blackwell vs. S. A. L. Ry. Co. therein referred to and it is ordered filed as a part of the record for a motion for a new trial.

This Mar. 12, 1914.

GEO. C. GROGAN,
Judge City Court of Elberton.

Filed in office March 13th, 1914. W. A. Rucker, Clerk.

Order Overruling Motion for New Trial.

Upon the hearing of the within motion for a new trial, it is adjudged and ordered that the same be and is hereby overruled and a new trial is refused, Mar. 13, 1914.

GEO. C. GROGAN,
Judge City Court of Elberton.

59 *Verdict and Judgment.*

We, the jury, find for plaintiff, $1,000. This the 13th day of February, 1914.

J. B. HIGGINBOTHAM, *Foreman.*

In the City Court of Elberton, February Term, 1914.

ELIZABETH BLACKWELL
v.
SEABOARD AIR LINE RAILWAY.

Suit for Damages.

Verdict for Plaintiff for $1,000.

Whereupon it is considered, ordered and adjudged upon the verdict of the jury in the above stated case that the plaintiff, Elizabeth Blackwell, do have and recover of and against the defendant, the Seaboard Air Line Railway, the sum of One Thousand Dollars, principal, and the further sum of — Dollars as costs of suit.

This February the 13th, 1914.

GEO. C. GROGAN,
Judge City Court of Elberton.

PULLIAM PROFFITT,
Platintiff's Attorney.

60 GEORGIA,
Elbert County:

Clerk's Office, City Court of Elberton.

ELBERTON, GA., April 2nd, 1914.

I hereby certify that the foregoing Thirty-nine (39) pages contain a true and complete transcript of such parts of the record in the case of Elizabeth Blackwell against Seaboard Air Line Railway as are in the bill of exceptions specified.

Witness my signature and the seal of said court hereto affixed, this the day and year above written.

[SEAL.] W. A. RUCKER,
Clerk City Court of Elberton.

(Endorsed:) Case No. 5631. Court of Appeals of Georgia, March Term, 1914. Seaboard Air Line Ry. versus Blackwell. Transcript of Record. Filed in office Apr. 3, 1914. Logan Bleckley, C. C. A. Ga.

61 Court of Appeals of the State of Georgia.

5631.

SEABOARD AIR LINE RY.
v.
BLACKWELL.

The Cout of Appeals desires instruction from the Supreme Court on the following question, a decision of which is necessary to the determination of the above-stated case, to wit.

Is the provision of the Civil Code, §2675, which requires the engineer of a locomotive to check the speed thereof on approaching a public road crossing, so as to stop in time should any person or thing be crossing the railroad track on said road, unconstitutional so far as applied to a railway train while engaged in interstate commerce, under the conditions set forth in paragraph 23 of the defendant's answer, for the reason that, as thus applied, the statute is a regulation of interstate commerce and repugnant to the provision of the constitution of the United States that "the Congress shall have the power to regulate commerce with foreign nations and among the several States" (article 1, section 8)?

Wherefore, the clerk of this court is instructed to transmit to the Supreme Court a certified copy of the above question, together with the bill of exceptions and the record in the case.

62 Court of Appeals of the State of Georgia, May 14, 1914.

The Honorable Court of Appeals met pursuant to adjournment.
Present, all of the Judges.
The following order was passed:

SEABOARD AIR LINE RAILWAY
v.
ELIZABETH BLACKWELL.

It is ordered that the clerk of this court transmit to the Supreme Court a properly certified copy of the question in this case upon which this court desires the instruction of the Supreme Court.

63 Supreme Court of Georgia.

ATLANTA, February 23, 1915.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

SEABOARD AIR LINE RY.
v.
ELIZABETH BLACKWELL.

This case came before this court upon a question certified by the Court of Appeals; upon consideration whereof it is ordered that the case be returned to that court with the instructions contained in the opinion this day filed. All the Justices concur except, Fish, C. J., absent on account of sickness.

Supreme Court of the State of Georgia.

CLERK'S OFFICE, ATLANTA, March 17, 1915.

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court affixed the day and year last above written.

[SEAL.] Z. D. HARRISON, *Clerk.*

64 2 Certified, March Term, 1914.

SEABOARD AIR LINE RAILWAY
v.
BLACKWELL.

By the COURT:

The provisions of the Civil Code (1910), § 2675, which requires the engineer of a locomotive to check the speed thereof on approaching a public-road crossing, so as to stop in time should any person or thing be crossing the railroad track on said road, is not unconstitutional as applied to a railway train while engaged in interstate commerce, under the conditions set forth in paragraph 23 of the defendant's answer, on the ground that, as thus applied, the statute is a regulation of interstate commerce and repugnant to the provisions of the constitution of the United States that "the Congress shall have power to regulate commerce with foreign nations and among the

several States." The statute is an exercise of the police power of the State, though to some extent it may indirectly affect interstate transportation.

Elizabeh Blackwell brought suit against the Seaboard Air Line Railway for an alleged homicide by the defendant of her minor son, who, while traveling along a public road, came to a crossing on its line, which was about two miles east of the city of Elberton, where defendant's track crossed such public road, and while crossing over the track in a buggy, was struck and killed by the engine of
65 the defendant. An act of negligence alleged in the petition was the failure on the part of the defendant to comply with the provisions of the statute of this State commonly known as the blow-post law." The 23rd paragraph of the defendant's plea was: "And for further plea and answer in this behalf this defendant says that in paragraph twelve (12) of said petition it is alleged as an act of negligence that the engineer in charge of the engine which is alleged to have caused the injury complained of failed to blow the whistle of the engine at a blow-post 400 yards south of the crossing where the homicide is alleged to have occurred, and failed to keep blowing said whistle until the train arrived at the crossing; and in paragraph thirteen (13) of said petition it is alleged that the employees of the defendant in charge of the engine which is alleged to have brought about the injury complained of failed to check the speed of the train at the blow-post 400 yards south of the crossing, and failed to keep checking the same until it reached the crossing, so as to stop in time should any person or thing be crossing said track on said road; and such failure on the part of the employees on said train is alleged in said paragraph to be negligence. In other parts of the petition it is inferentially charged that a failure on the part of the employees in charge of the train to comply with what is known as the blow-post law in force in this State was negligence on the part of this defendant; and it is sought in said petition, and espe-
66 cially the paragraphs above referred to, to charge this defendant as a matter of law, in failing to have its employees comply with the provisions of said blow-post law. This defendant denies that the failure to comply with said blow-post law was negligence on its part relatively to the transaction in question. This defendant alleges that the law above referred to as the blow-post law is that set forth in sections 2675, 2676 and 2677 of the Code of this State, adopted in 1910, and is in the following language:

'§ 2675. A post to be erected. There must be fixed on the line of said roads, and at the distance of four hundred yards from the center of each of such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road.

'§ 2676. Neglecting to erect such posts. Should any company fail or neglect to put up said posts, the superintendent thereof shall be guilty of a misdemeanor.

'§ 2677. Failing to blow whistle. If any engineer neglects to blow said whistle as required, and to check the speed as required, he is guilty of a misdemeanor: Provided, that within the cor-
67 porate limits of the cities, towns, and villages of this State, the several railroad companies shall not be required to blow the whistle of their locomotive on approaching crossings or public roads in said corporate limits, but in lieu thereof the engineer of said locomotive shall be required to signal the approach of their trains to such crossings, and public roads in said corporate limits, by tolling the bell of said locomotive; and on failure to do so, the penalties of this section shall apply to such offense.'

"This defendant avers that the train of defendant which is referred to in the petition, as appears from the allegations of said petition, was a train which ran from Atlanta in the State of Georgia to Abbeville in the State of South Carolina, and said train was used as an instrumentality of this defendant in carrying on its business as an interstate carrier of passengers and freights between the points named, and in said train were carried passengers from the State of Georgia to the State of South Carolina and other States, and upon said train also the Southern Express Company, under a contract with this defendant, carried articles of freight between Atlanta and other points in the State of Georgia to Abbeville and other points in the State of South Carolina, and other points in other States, and upon said train were also carried the mails of the United States, and the train in question was actually engaged in commerce between
68 the several States, and especially between the State of Georgia and the State of South Carolina. This defendant avers that the line of this defendant over which said train was operated ran from the city of Atlanta, in the State of Georgia, to and over the Savannah river, which is the boundary line between the State of Georgia and the State of South Carolina, and thence to the City of Abbeville, in the State of South Carolina, and thence to other points in the States of North Carolina and Virginia. This defendant alleges that between the city of Atlanta, in the State of Georgia, and the Savannah river, where the same is the boundary line of the State of Georgia, there are one hundred and twenty-four (124) points where the line of this defendant crosses public roads of the different counties of this State, established pursuant to law, and all of such crossings are at grade. This defendant alleges that the distance from the city of Atlanta to the line of the State at the Savannah river, traversed by the line of railway of this defendant, is one hundred and twenty-three (123) miles. This defendant alleges that, according to the provisions of said blow-post law above set forth, it is required of the engineer in charge of railway trains to begin to check the train at a point 400 yards from each road crossing and to continue to check during the time that said 400 yards is being traversed, and have the engine under such control at the crossing that if any person or thing shall be upon the crossing, it shall
69 be in the power of the engineer to stop the train before it passes the crossing. This defendant avers that in order to comply with said law it will be necessary for the engineer in charge

of the train to so slacken the speed of the train that there would be practically a full stop of the train at each of the road crossings over which the line of railway was constructed. This defendant avers that the time that would be required to so check and slacken the speed of the train, and then, after the crossing was passed, to increase the speed to the rate at which the train was running, would depend upon various conditions that might or might not exist at the time and at the crossings, such as the weight of the train, the state of the weather as affecting the condition of the rail, and the per cent. of the grade. This defendant avers that to comply with said law relatively to a train composed of an engine and three cars, consisting of a mail car and two coaches or similar cars, the time consumed in checking and slackening speed and increasing speed after the crossing was passed would not be less than three (3) minutes, and that if the train was composed of a larger number of cars the time consumed would be greater. This defendant avers that this allegation as to the time consumed in complying with such law at each crossing is based upon ordinary conditions; that is, where there is no grade, or the percentage of grade is low, where the conditions of the
70 weather are such as not to affect the track, and all conditions are usual and ordinary. This defendant avers that where the grade is heavy or great and the track is affected by the weather, the time consumed would be greater. This defendant avers that a train composed of an engine and freight-cars, being ordinarily a longer train than a passenger-train, the time consumed in complying with said law at each crossing with the average freight-train would be not less than five minutes. This defendant avers that the train referred to in the petition which is alleged to have caused the injury complained of was a train composed of an engine, a mail car, and two coaches; that is to say, a train composed of an engine and three ordinary coaches; and this defendant avers that if the provisions of the blow-post law above set forth had been complied with on the day in question, from the time that said train left Atlanta in the State of Georgia, until it reached the Savannah river, the boundary line of the State, that at least three minutes would have been consumed at each crossing in complying with said blow-post law, and that the time consumed in compliance with said law on the day in question between the city of Atlanta and the Savannah river would have been more than six hours. This defendant alleges that according to the adopted schedule of said train the time consumed in running from the city of Atlanta to the Savannah river was four hours and-
71 thirty minutes; and this schedule was operated by giving a signal from the whistle of the engine on the approach to each crossing, but not checking and slackening speed in approaching the crossing; and that if said law had been complied with, the time consumed in operating the train from the city of Atlanta to the Savannah river would have been more than ten hours and a half. This defendant further avers that the maximum rate of speed for freight-trains upon the line of this defendant is twenty miles an hour, and that if the law was complied with in the operation of freight-trains between the city of Atlanta and the Savannah river, the time con-

sumed in complying with said law at the public-road crossing would be ten hours or more, and the time consumed in operating a freight-train between the city of Atlanta and the Savannah river would be more than sixteen hours. This defendant further alleges that the 124 public-road crossings above referred to are the usual and ordinary grade crossings, and there is nothing in the conditions surrounding which makes any one of them peculiarly dangerous, other than such danger as may result from the crossing of a public road by a railroad track at grade. This defendant further alleges that between the city of Atlanta and the Savannah river the line of railway of this defendant crosses the tracks of two other railroads, and that under the laws of this State, wherever one railroad track crosses another, the
72 engineer in charge of the train is required to bring his train to a full stop fifty feet from the crossing, and that the time consumed in such crossing would increase the time required to operate the trains between the points above referred to. This defendant alleges that the blow-post law above referred to, in so far as it requires the engineer in charge of trains to begin to check his train at a point 400 yards from the crossing and to keep checking until the crossing is reached, and have his train under such control that the same can be stopped if there should be any person or thing upon said track at said crossing, is, as applied to the train in question which is alleged to have brought about the injury complained of, a regulation of interstate commerce and an unreasonable regulation of such commerce, and is in violation of paragraph three, section eight, article one, of the Constitution of the United States, which declares: 'The Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes,' which confers upon Congress the exclusive power to regulate the commerce among the several States; and said blow-post law is, as applied to the train in question, null and void. Wherefore this defendant says that each and every allegation of said petition which charges this defendant with negligence in failing to comply with said law, and especially paragraph- twelve and thirteen of
73 said petition, set forth no act which would in law amount to negligence; and this defendant alleges that it is not guilty of any negligence under the facts so alleged, and is not liable to plaintiff on account of its failure to comply with the provisions of said blow-post law; and all of this said defendant is ready to verify."

To this special plea the plaintiff filed a written demurrer, and a motion to strike the same, upon the ground that it set forth no legal defense against the cause of action set out in the plaintiff's petition. The trial court sustained the demurrer and struck the special plea above referred to, "except so much as reads as follows: 'The defendant denied that the failure to comply with said blow post law was negligence on its part relatively to the transaction in question.'" The defendant excepted pendente lite, assigning error upon this ruling. The case proceeded to trial, and resulted in a verdict in favor of the plaintiff. The defendant's motion for a new trial having been overruled, it sued out a bill of exceptions to the Court of Appeals, assigning error upon the refusal to grant a new trial, and upon

the exceptions pendente lite. The Court of Appeals propounds the following question to this court: "Is the provision of the Civil Code, §2675, which requires the engineer of a locomotive to check the speed thereof on approaching a public-road crossing, so as to
74 stop in time should any person or thing be crossing the railroad track on said road, unconstitutional so far as applied to a railway train while engaged in interstate commerce, under the conditions set forth in paragraph 23 of the defendant's answer, for the reason that, as thus applied, the statute is a regulation of interstate commerce and repugnant to the provision of the Constitution of the United States that 'the Congress shall have power to regulate commerce with foreign nations and among the several States?'" (In incorporated towns and cities the bell of the engine is required to be rung in approaching public crossings, in lieu of the blowing of the whistle.)

LUMPKIN, *J.*:

It is well established by decisions of the Supreme Court of the United States that the right to regulate interstate commerce is exclusively vested in Congress, and that the States can not pass any laws directly regulating such commerce; but that the States may, in the exercise of their police power, pass laws in the interest of public safety which do not interfere directly with the operation of interstate commerce; that the constitutionality of a State statute regulating the operation of railroad trains depends upon its effect on interstate commerce; and that, in the absence of congressional regulation on the subject, a State may make reasonable regulations as to the
75 manner in which trains shall approach, and give notice of their approach to, dangerous crossings, so long as they are not a direct burden upon interstate commerce. Southern Ry. Co. v. King, 217 U. S. 524 (30 Sup. Ct. 594, 54 L. ed. 868). No exact rule can be formulated by which to determine in advance what enactments along this line by States are valid and what are invalid. In Southern Ry. Co. v. Atlanta Sand Co., 135 Ga. 35 (68 S. E. 807), it was said (p. 46): "As the Supreme Court of the United States have mentioned reasonableness as a guide in determining the extent to which a State law may affect interstate shipments without being invalid, and as reasonableness or unreasonableness is a matter for which no absolute standard can be prescribed, but a thing sometimes appears reasonable to one mind, yet unreasonable to another, and even the same person may change his view as to what is reasonable with age, experience, and reflection, the determination of questions like that now before us involves no small difficulty." We will cite only a few of the many cases in which State laws have been held valid though to some extent affecting interstate commerce. In Louisville & Nashville R. Co. v. Kentucky, 161 U. S. 677 (16 Sup. Ct. 714, 40 L. ed. 849). Mr. Justice Brown said (p. 702): "It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation
76 was within its ordinary police powers. Nearly all the railways in the country have been constructed under State author-

ity, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests." In [illegible] case a State statute of Kentucky prohibiting a railroad or [illegible]mmon carriers from consolidating or pooling its earnings [illegible]arallel or competing line, and prohibiting certain other lease[illegible] combinations, was held valid. In Hennington v. State, 90 Ga. 396 (17 S. E. 1009), a statute of this State which made it a misdemeanor to run a freight-train on Sunday was upheld; and this was affirmed in Hennington v. Georgia, 163 U. S. 299 (16 Sup. Ct. 1086, 41 L. ed. 166). Seale v. State, 126 Ga. 644 (55 S. E. 472). In Atlantic Coast Line Railroad Co. v. State, 135 Ga. 545 (69 S. E. 725, 32 L. R. A. (N. S.) 20), a law of this State which required railroads to use headlights of a certain character was upheld: and this was affirmed in 234 U. S. 280 (34
77 Sup. Ct. 829, 58 L. ed. 1312). In Lake Shore &c. Ry. Co. v. Ohio, 173 U. S. 285 (19 Sup. Ct. 465, 43 L. ed. 702), a State law requiring three regular passenger-trains to stop each way daily at every village containing over 3,000 inhabitants was upheld. In Erb v. Morasch, 177 U. S. 584 (20 Sup. Ct. 819, 44 L. ed. 897), it was held that a regulation by the city of the speed at which railroad trains might run within its limits was valid, although applicable to interstate trains, at least until Congress had acted on the subject. We forbear undertaking to map out "the twilight zone" in which State authorities may act until Congress has acted on the subject. See also Crutcher v. Kentucky, 141 U. S. 47 (11 Sup. Ct. 851, 34 L. ed. 649); Southern Railway v. Melton, 133 Ga. 277, 298 (65 S. E. 665), and cit.; Southern Railway Co. v. Atlanta Sand &c. Co., supra.

In Southern Railway Co. v. Grizzle, 131 Ga. 287 (62 S. E. 177), it was declared that the section of the State Code now under consideration was not, with respect to a railroad company doing an interstate business, invalid as being a regulation of interstate commerce, but was a police regulation designed to secure public safety, and valid as such.

In Central Railroad Co. v. Hall, 109 Ga. 367 (34 S. E. 605), the actual ruling was that where the crossing was one-half mile from the depot from which the train started, the law applied. In
78 the opinion Mr. Chief Justice Simmons expressed some views as to the hardship or effect upon rapid transit which might arise from the law. What he said on this subject was an obiter dictum. He practically conceded the propriety of such a law before the days of rapid transit, as an exercise of the police power for the preservation of the public safety. It can hardly be claimed that rapid transit is more important than human life. It must also be borne in mind that while the commerce of the country calls for rapid transit, the local development and increase in population also create a

greater necessity for public highways and for means for protecting the safety of those who use them.

In Southern Railway Co. v. King, supra, it was held that one who would strike down a statute as unconstitutional must show that it affects him injuriously and actually deprives him of a constitutional right. Mr. Justice Day said (pp. 536, 537), "They (referring to the averments of the plea) do not show the number or location of the crossings at which the railway company would be required to check the speed of its trains so as to interfere with their successful operation. For aught that appears as allegations of fact in this answer, the crossing at which this injury happened may have been so located and of such dangerous character as to make the slackening of
79 trains at that point necessary to the safety of those using the public highway, and a statute making such requirement only a reasonable police regulation, and not an unlawful attempt to regulate or hinder interstate commerce. In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer set up no legal defense, and that the demurrer thereto was properly sustained."

If the State Legislature may regulate the speed of trains in approaching dangerous crossings and the signals to be given in so doing, necessarily it must be allowed some judgment in determining when such regulations should be made. It requires no argument to prove that grade crossings are dangerous, especially in populous communities. In urging that, if the number of these crossings increase, the police power of the State terminates, there is danger of taking the anomalous position that as the danger to the public increases the State loses its authority to protect its citizens therefrom. Take, for instance, a populous city. The streets may cross the railroad at frequent intervals and many people may pass over them. Surely this would rather furnish a reason for holding that the State has the power to protect the public in such places of danger than that its effort to do so would be invalid because it might require a railroad train coming from another
80 State to slacken its speed at those places. In the present case the railroad company alleges that between Atlanta and the Savannah river (a distance of 123 miles) there are one hundred and twenty-four grade crossings. It is hardly within the range of possibility that they are distributed equally along the line. On the contrary it may fairly be assumed that many of these crossings are in populous sections—at stations or in towns or cities along the route. It is not alleged how many of them are in the country or in sparsely settled districts. So that it may be that the very situation hypothetically stated above may actually exist in this case, and the railroad company may be complaining because at a place in a populous section there are frequent crossings, and that it ought not to be required by the State law to regard the safety of the public at such places, because of the very increase of danger at them. It does not appear that the operation or speed of trains in stretches of country sparsely settled and with few crossings is seriously af-

fected, or that the trains may not run for long distances without stoppage; or that slowing down from a high speed in populous places may not serve for several crossings, if such allegations would make a difference. Surely it could not be held that a railroad company has the right to run at an unrestricted speed and without giving proper signals through towns, villages, or densely populated communities because there may be frequent grade crossings at such places. Furthermore, crossings may be situated between two neighboring communities, or they may be at places of danger where to prohibit the State from restricting the speed and requiring the giving of signals would be to license rashness.

81

The public have a right to use the public highways. Railroads have no inherent right to pass over them, except by virtue of a franchise from the State. The State has the right, in the exercise of its police power, to pass laws to preserve the public safety. Laws must be general in their character, and can not well single out and specify one public crossing and omit another, if the condition is such as to make a police regulation for safety proper. The mere fact that on a particular day or series of days a great number of people may not pass over a particular crossing is not conclusive that it is not a place requiring protection to the public. On other days there may be reasons why a great number of people would pass over the same crossing. Who shall determine when the State shall exercise the unquestionable police power for the safety of the lives of its citizens? Shall it be the legislature who represents the sovereignty of the State in making laws, or shall every law thus enacted be subject to the opinion of a jury? How far shall the legislative discretion in determining whether a particular protective law should be enacted be nullified, where it undoubtedly has some basis, and the entire matter be relegated as a mere question of fact to a jury in each case, with the possibility of difference in their findings? Shall the law which requires the erection of blow-post, the giving of signals, and the regulation of speed, for the protection of the public at the crossing of public highways at grade over railroads, be entirely in the air, and applicable to one public crossing and not to another, or to the same crossing at some times and not at others, according as a jury may find in regard to it? Under our system issues of fact are for the jury; and if the validity of this law in each case becomes a question of fact, then it will be impossible to tell in advance what is the law applicable to crossings of public highways and railroads. Or shall it be determined by the opinion of a court in each case, with a like resulting uncertainty?

82

In the present case it is alleged in general terms that the 124 public-road crossings over the defendant's line of road in this State are the usual and ordinary grade crossings, and that there is nothing in the conditions surrounding them which makes any one of them peculiarly dangerous other than such danger as is incident to the crossing of a public highway and the railroad track at grade. We do not think that this is sufficient to show that the law is invalid.

Applying the well-recognized rule that allegations are to
83 be construed most strongly against the pleader, this does not negative the fact that all of these crossings are dangerous. It in effect concedes that they are all dangerous as grade crossings, but merely alleges in general terms that there is nothing to make any one of them peculiarly dangerous other than this fact. Nothing more is stated as to the particular crossing where the injury occurred, except that it is within about two miles of a city.

In the Civil Code (1910) § 2585, par. 5, which forms a part of the general law on the subject of incorporation of railroad companies and their powers, it is declared that, "whenever the track of any such road shall touch, intersect, or cross any road, highway or street, it may be carried over or under, or cross at grade level or otherwise, as may be found most expedient for the public good." This section was taken from the act of 1892, but a similar provision existed under the act of 1881. While the defendant company may be a foreign corporation, it must operate in Georgia by virtue of a Georgia franchise; and while the charter under which it, or some subordinate company under the franchise of which it may operate, may not have been granted under the general incorporation law, yet that law indicates a public policy by which railroad companies may avoid danger and delays at grade crossings by means of crossings above or below grade. The code section now
84 under consideration does not apply where the crossing is not at grade. Barton v. Southern Railway Co., 132 Ga. 841 (64 S. E. 1079, 22 L. R. A. (N. S.) 915, 16 Ann. Cas. 1232). It is quite probable that in many instances grade crossings could be obviated altogether. Has a railroad company the constitutional right to disregard laws for obviating delays and dangers, and nevertheless to declare that the legislature cannot enact a law of the character now under consideration for the protection of the public where grade crossings exist, and when in the legislative opinion there is reasonable ground for such an enactment?

If the rule is that one who seeks to overthrow a police regulation enacted by a State for public safety must make out a clear case in order to accomplish that purpose, it seems to us that the railroad in this case has failed to do so. Congress has not undertaken to pass any law covering the subject involved in the code section now being considered. It is therefore not a case of conflict of a State law and an act of Congress within the power of the latter to pass; but it is a question whether the legislative power of this State has been so arbitrarily used that it shall be declared that the power conferred by the Constitution of the United States upon Congress to regulate commerce among the several States shall ex proprio vigore strike down the hands of the State when they stretch out to protect the public from danger.

85 The police regulation of speed and signals at highway crossings over a railroad in the State is not a matter which is inherently and exclusively one for congressional control; otherwise, the decisions upholding some of these State regulations could not have been made. Congress has not assumed control over the sub-

ject. The law under consideration does not undertake directly to deal with interstate commerce. Whatever effect such law may have on interstate commerce is only incidental and indirect. It does not prohibit interstate commerce or in terms refer to it. It does not directly impose any burden on it. It merely provides for public safety at public crossings where the legislature have determined that such provision was necessary; and if it causes trains to move somewhat more slowly at such places, as a means of safety to the public, how can it be declared that such a law is invalid?

We recognize the ruling made in Southern Ry. Co. v. King, supra, and by no means intend to disregard what was there decided. But, if what we have said above is well founded, the ruling here made does not conflict with what is held in that case. When a State statute is on trial for its life, some presumption in its favor should be indulged, and it should not be declared void except in a clear case.

We do not think that such a case has been made here as re-
86 quires a declaration that the section of the State Code which is attacked is invalid relatively to the railroad company.

If we should declare this police law of the State unconstitutional or invalid, should it be held void in toto as to all railroads and all crossings within the State over which interstate trains or commerce may pass, without regard to the number of such crossings over the different railroads, and their situations, or dangerous character; or should the law be declared invalid only as to the Seaboard Air-Line Railway, leaving it to stand as to all other railroads, at least until further consideration; and if it should be declared invalid as to the Seaboard Air-Line Railway, should it be so declared as to all crossings of public highways over that road, whether in populous districts, or in towns or cities, or not, or only as the particular crossing where the injury complained of in this case occurred? Moreover, the danger to the public is as great from an interstate train as from an intrastate train. If we should hold, relatively to interstate trains, that this law is invalid, or invalid as to certain railroads, or as to certain crossings, should we still hold that, relatively to intrastate trains and those carrying only intrastate commerce, the provision is legitimate and valid to safeguard the public. In other words, is it a good law for some railroads, some trains, and some crossings, and an invalid law as to other railroads and other
87 trains and other crossings, though the purpose of the law in all cases is to provide for the safety of the public? It must be remembered that railroads are in the nature of public highways, and that other public roads are also public highways, and that the traveling public have the right to use these public highways which traverse the country, though they may cross the lines of railroads.

Of course, the facts well pleaded must be taken as true on demurrer, whether in fact they are correct or not. And we have so considered them in the preceding discussion. Mere conclusions are not admitted by a demurrer.

All the Justices concur except Fish, C. J., absent.

Clerk's Office, Supreme Court of Georgia.

ATLANTA, Mar. 17, 1915.

I hereby certify that the foregoing pages hereto attached contain a true and complete copy of the opinion of the Supreme Court of Georgia in the case therein stated, as appears from the original of file in this office.

Witness my signature and the seal of said court hereto affixed the day and year above written.

[SEAL.] Z. D. HARRISON, *Clerk.*

88 (Endorsed:) Case No. 5631. Court of Appeals of Georgia. March Term 1914. Seaboard Air Line Ry. versus Blackwell. Transcript of Record. Instructions of Supreme Court. Filed in office Mar. 17, 1915. Logan Bleckley, C. C. A. Ga.

89 Court of Appeals of Georgia.

5631.

SEABOARD AIR LINE RY.
v.
BLACKWELL.

By the Court—RUSSELL, *C. J.*:

1. The trial judge did not err in sustaining the demurrer to the twenty-third paragraph of the answer, wherein the defendant pleaded that the failure to comply with the "blow-post law," as embodied in sections 2675, 2676, and 2677 of the Civil Code, was not, as a matter of law, negligence on the part of the defendant relatively to the transaction in question, and in thereafter striking that paragraph of the answer. Seaboard Air Line Ry. v. Blackwell, 143 Ga. 237, 84 S. E. 472.

2. Whether the plaintiff's son, by exercising ordinary care for his own safety, could have avoided the injury which resulted in his death, was a jury question; and in view of the evidence as to the defendant's failure to comply with the provisions of the "blow-post law," there is sufficient testimony as a whole to support the jury's finding in favor of the plaintiff.

3. The verdict having been approved by the trial judge, and there being no complaint that any error was committed in the trial, other than the alleged error in striking the portion of the defendant's answer referred to above, the judgment overruling the motion for a new trial, based only on the general grounds, will not be disturbed.

Judgment affirmed.

90 Court of Appeals of the State of Georgia.

ATLANTA, June 28, 1915.

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

SEABOARD AIR LINE RY.
v.
ELIZABETH BLACKWELL.

This case came before this court upon a writ of error from the city court of Elberton; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.
Bill of costs, $10.00.

91 UNITED STATES OF AMERICA, *ss:*

[Seal U. S. District Court, N. D. Georgia.]

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of the State of Georgia, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Seaboard Air Line Railway, plaintiff in error, and Elizabeth Blackwell, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity
92 was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Seaboard Air Line Railway, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that

error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixth day of July, in the year of our Lord one thousand nine hundred and fifteen.

OLIN C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

Allowed by

RICHARD B. RUSSELL,
Chief Judge of the Court of Appeals
of the State of Georgia.

Filed in office, July 9, 1915.

LOGAN BLECKLEY,
Clerk Court of Appeals of Georgia.

93 [Endorsed:] Supreme Court of the United States, October Term, 191–. —— —— vs. —— ——. Writ of Error.

94 UNITED STATES OF AMERICA, *ss:*

To Elizabeth Blackwell, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the State of Georgia, wherein the Seaboard Air Line Railway is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Richard B. Russell, Chief Judge of the Court of Appeals of the State of Georgia, this sixth day of July, in the year of our Lord one thousand nine hundred and fifteen.

RICHARD B. RUSSELL,
Chief Judge of the Court of Appeals
of the State of Georgia.

95 STATE OF GEORGIA,
Elbert County:

Due and legal service of the within citation is hereby acknowledged, and having received a copy thereof, all further service and notice is waived.

This 8th day of July, 1915.

ELIZABETH BLACKWELL,
By Her Attorney of Record, PULLIAM PROFFITT.

Filed in office, July 9, 1915.

LOGAN BLECKLEY,
Clerk Court of Appeals of Georgia.

96 In the Court of Appeals of the State of Georgia.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error,
v.
ELIZABETH BLACKWELL, Defendant in Error.

To the Honorable Richard B. Russell, Chief Judge of the Court of Appeals of the State of Georgia:

The petition of Seaboard Air Line Railway, a corporation, respectfully shows:

That heretofore, to wit, upon the 13th day of September, 1913, Elizabeth Blackwell brought her suit in the City Court of Elberton, in the County of Elbert, in the State of Georgia, against your petitioner. The petition of the plaintiff in said case sought to recover damages of your petitioner by reason of the homicide of plaintiff's son, said damages being laid in the sum of Two Thousand Nine Hundred and Ninety-nine ($2,999) Dollars, and said homicide being alleged by plaintiff to have been the result of the negligent operation of a train of petitioner over a certain public road crossing, the son of petitioner, as alleged in the petition of plaintiff, being at the time of the homicide in a buggy upon said crossing.

One of the acts of negligence set forth in the petition of plaintiff was that "the defendant and its employees failed to check the speed of said train at a blow post four hundred yards south of said crossing and failed to keep checking the same until it reached said
97 crossing, so as to stop in time should any person or thing be crossing said track on said road, and such failure was negligence."

To said suit your petitioner, the defendant therein, filed its answer, and among other matters set up in its answer was the defense that the statute of the State of Georgia, which required engineers of railway trains to blow the whistle of the engine at a point four hundred yards from every public road crossing and to continue to blow the whistle until the engine arrived at the public road and to simultaneously check and keep checking the speed of the train so as to stop in time should any person or thing be crossing said track on said road, was, so far as said statute related to the matter of checking the train and especially as applied to the facts set forth in the answer of petitioner in reference to the line of railway of petitioner, invalid as a regulation of Interstate Commerce and was in violation of paragraph 3, section 8, article 1, of the Constitution of the United States, which declares, "The Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes", which confers upon Congress the exclusive power to regulate the commerce among the several states, and that said statute, commonly called the Blow Post Law, was as applied to the

train referred to in the answer null and void as an unreasonable regulation of such commerce.

To that portion of the answer of petitioner above referred to the plaintiff filed a demurrer upon the ground that the same set
98 up no legal defense against the cause of action set out in the petition of plaintiff. The demurrer so filed came on to be heard on January 24, 1914, and the Judge of the City Court of Elberton on that day passed an order sustaining the demurrer and striking from the answer of the defendant all of paragraph 23 of such answer, which was the paragraph containing the matter above referred to, except that portion of the paragraph which set forth that "this defendant denies that the failure to comply with said Blow Post Law was negligence on its part relatively to the transaction in question."

Thereafter said case came on for trial in said city court before the Judge of said court, and a jury, and the jury, under the instructions of the Judge, returned a verdict in favor of the plaintiff for the sum of One Thousand ($1,000) Dollars. Your petitioner, the defendant in said case, filed its motion for a new trial and the same was overruled by the Judge, and thereafter your petitioner filed its bill of exceptions assigning error upon the judgment of the court sustaining the demurrer to the portion of the answer above referred to and to the judgment overruling the motion for a new trial, and carried the case to the Court of Appeals of the State of Georgia.

The decision of the Judge of the city court on the demurrer to the portion of the answer above referred to involving the question
99 as to the constitutionality of an act of the General Assembly of this State, and a decision of such question being necessary to a determination of the case, the Court of Appeals of the State of Georgia, in pursuance of the provisions of the Constitution of the State of Georgia, certified such question to the Supreme Court of Georgia and asked the instructions of that court as to how the same should be decided.

On the 23rd day of February, 1915, the Supreme Court of the State of Georgia instructed the Court of Appeals of the State of Georgia, on the question certified to them, holding that the provisions in the statute of the State of Georgia above referred to, requiring the engineer of a locomotive to check the speed thereof on approaching a public road crossing, so as to stop in time should any person or thing be crossing the railroad track on said road, is not unconstitutional as applied to a railway train while engaged in interstate commerce under the conditions set forth in paragraph 23 of the defendant's answer, on the ground that as thus applied the statute is a regulation of Interstate Commerce and repugnant to the provisions of the Constitution of the United States, that "The Congress shall have power to regulate commerce with foreign nations and among the several states".

On the 29th day of June, 1915, the Court of Appeals of the State of Georgia, having received the instructions above referred to
100 from the Supreme Court of the State, entered a judgment affirming the judgment of the City Court of Elberton overruling the motion for new trial and sustaining the verdict against the defendant in that court.

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The decision as rendered by the Court of Appeals of the State of Georgia was as follows:

"1. The trial judge did not err in sustaining the demurrer to the twenty-third paragraph of the answer, wherein the defendant pleaded that the failure to comply with the 'blow post law', as embodied in sections 2675, 2676, and 2677 of the Civil Code, was not, as a matter of law, negligence on the part of the defendant, relatively to the transaction in question, and in thereafter striking that paragraph of the answer. Seaboard Air Line Ry. v. Blackwell, 143 Ga. (84 S. E. 472).

2. Whether the plaintiff's son, by exercising ordinary care for his own safety, could have avoided the injury which resulted in his death, was a jury question; and in view of the evidence as to the defendant's failure to comply with the provisions of the 'blow post law', there is sufficient testimony as a whole to support the jury's finding in favor of the plaintiff.

3. The verdict having been approved by the trial judge, and there being no complaint that any error was committed in the trial, other than the alleged error in striking the portion of the defend-
101 ant's answer referred to above, the judgment overruling the motion for a new trial, based only on the general grounds, will not be disturbed."

Petitioner further shows that the said judgment of said Court of Appeals of the State of Georgia was and is a final judgment in the highest court of the State of Georgia in which a decision in said suit could or can be had.

Petitioner further shows that a Federal question was made in said case, to wit: Whether the provision of section 2675 of the Civil Code of 1910 of the State of Georgia, which requires the engineer of a locomotive to check the speed thereof on approaching a public road crossing, so as to stop in time should any person or thing be crossing the railroad track on said road, is, as applied to a railroad train while engaged in Interstate Commerce under the conditions set forth in paragraph 23 of the defendant's answer in said suit, a regulation of Interstate Commerce and repugnant to the provisions of the Constitution of the United States that "The Congress shall have the power to regulate commerce with foreign nations and among the several states"; and that said judgment of said Court of Appeals of the State of Georgia was repugnant to and in conflict with the clause of the Constitution above quoted and that said judgment of said Court of Appeals of the State of Georgia was contrary thereto and that a decision of said Federal question was necessary to the judgment
102 rendered.

Wherefore, your petitioner presents herewith an exemplified transcript of the record of the Court of Appeals of the State of Georgia in said case and prays that a writ of error to said Court of Appeals of the State of Georgia be allowed; that citation be granted and signed; that the bond herewith presented be approved, and that upon compliance with the terms of the statute in such cases made and provided said bond and writ of error may operate as a supersedeas, that the errors complained of may be reviewed in the Supreme

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Court of the United States, and the judgment aforesaid of said Court of Appeals of the State of Georgia be reversed.

SEABOARD AIR LINE RAILWAY,
By Its Attorneys at Law, ANDREW J. COBB,
HOWELL C. ERWIN,
LAMAR C. RUCKER,
Petitioner.

COBB, ERWIN & RUCKER,
Attorneys and of Counsel for Petitioner.

103 In the Court of Appeals of the State of Georgia.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error,
v.
ELIZABETH BLACKWELL, Defendant in Error.

The above entitled cause coming on to be heard upon the petition of the plaintiff in error therein for a writ of error from the Supreme Court of the United States to the Court of Appeals of the State of Georgia, and upon an examination of said petition and the record in said matter and desiring to give the petitioner an opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter;

It is ordered that a writ of error be and the same is hereby allowed to this court from the Supreme Court of the United States and that the bond presented by the said petitioner be and the same is hereby approved;

It is further ordered that this petition and order act as a supersedeas until the case is finally disposed of in the Supreme Court of the United States.

This 6th day of July, 1915.

RICHARD B. RUSSELL,
Chief Judge of the Court of Appeals of the State of Georgia.

Filed in my office, this 9 day of July, 1915.
LOGAN BLECKLEY,
Clerk of the Court of Appeals of the State of Georgia.

104 In the Court of Appeals of the State of Georgia.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error,
v.
ELIZABETH BLACKWELL, Defendant in Error.

Assignments of Error.

Now comes Seaboard Air Line Railway, the plaintiff in error in the above entitled cause, and respectfully submits that in the record,

proceedings, decision and final judgment of the Court of Appeals of the State of Georgia, in the above entitled matter, there is a manifest error in this, to wit:

1. The court erred in sustaining the demurrer of the plaintiff to that portion of the answer of the defendant embraced in paragraph 23 thereof and in striking such portion of said paragraph.

2. The court erred in affirming the judgment of the city court of Elberton in sustaining the demurrer of the plaintiff to that portion of the answer of the defendant embraced in paragraph 23 of such answer and in striking such portion of said answer.

3. The court erred in holding that the provision of section 2675 of the Civil Code of the State of Georgia of 1910, which requires the engineer of a locomotive to check the speed thereof on approaching a public road crossing, so as to stop in time should any person or thing be crossing the railroad track on said road, was
105 not unconstitutional as applied to a railway train while engaged in Interstate commerce under the conditions set forth in paragraph 23 of the defendant's answer, on the ground that as thus applied the statute is a regulation of interstate Commerce and repugnant to the provision of the Constitution of the United States that "the Congress shall have power to regulate commerce with foreign nations and among the several states."

4. The court erred in holding that the facts alleged in paragraph 23 of the defendant's answer were not a complete defense available to the defendant as against the allegations in the petition of the plaintiff that the failure to comply with the provisions of section 2675 of the Civil Code of Georgia of 1910, which requires the engineer of a locomotive to check the speed thereof on approaching a public road crossing, so as to stop in time should any person or thing be crossing the railroad track on said road, was an act of negligence rendering the defendant liable.

5. The court erred in holding that the trial judge, the Judge of the City Court of Elberton, did not err in sustaining the demurrer to the 23rd paragraph of the answer of the defendant wherein the defendant pleaded that the failure to comply with the "Blow Post Law", as embodied in sections 2675, 2676 and 2677 of the Civil Code of the State of Georgia of 1910, was not, as a matter of law, negligence on the part of the defendant relatively to the trans-
106 actions set forth in the petition of plaintiff, and in thereafter striking that paragraph of the answer.

6. The court erred in holding that in view of the evidence as to the defendant's failure to comply with the provisions of the "Blow Post Law," being the law embodied in sections 2675, 2676 and 2677 of the Civil Code of the State of Georgia of 1910, that there was sufficient testimony as a whole to support the jury's finding in favor of the plaintiff.

ANDREW J. COBB,
HOWELL C. ERWIN,
LAMAR C. RUCKER,
Attorneys of Record for Plaintiff in Error.

COBB, ERWIN & RUCKER,
Of Counsel.

Filed in my office this 9 day of July, 1915.
LOGAN BLECKLEY,
Clerk Court of Appeals
of the State of Georgia.

107 In the Court of Appeals of the State of Georgia.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error,
v.
ELIZABETH BLACKWELL, Defendant in Error.

Know all men by these presents: That we, the Seaboard Air Line Railway, as principal, and the Fidelity and Deposit Company of Maryland, as security, are held and firmly bound unto Elizabeth Blackwell, in the sum of Two Thousand ($2,000) Dollars, to be paid to the said Elizabeth Blackwell, her heirs, administrators, executors and assigns, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents.

Signed with our seals and dated this — day of July, 1915.

Whereas, the above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of the State of Georgia:

Now therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute *in* said writ of error to effect and answer all costs and damages, including the judgment in favor of the defendant in error against the plaintiff in error entered in the city court of Elberton, and shall pay the eventual condemnation money in said case if it shall fail to
108 make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

SEABOARD AIR LINE RAILWAY. [L. S.]
By Its Attorneys at Law as of Record:
COBB, ERWIN & RUCKER,
By LAMAR C. RUCKER, *Principal.*
FIDELITY & DEPOSIT CO. OF
MARYLAND. [L. S.]
By S. C. UPSON, *Att'y in Fact, Security.*

The within and foregoing bond is approved both as to sufficiency and form, this 6th day of July, 1915.

RICHARD B. RUSSELL,
Chief Judge of the Court of Appeals
of the State of Georgia.

Filed in my office, this 9 day of July, 1915.
LOGAN BLECKLEY,
Clerk of the Court of Appeals
of the State of Georgia.

109 In the Court of Appeals of the State of Georgia.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error,
v.
ELIZABETH BLACKWELL, Defendant in Error.

Writ of Error from the Supreme Court of the United States to the Court of Appeals of the State of Georgia.

Præcipe for Record.

To the Clerk of the Court of Appeals of the State of Georgia:

You are directed to incorporate in the transcript of the record on the above stated writ of error and transmit to the Supreme Court of the United States the following portions of the record in said case:

1. The writ of error.
2. The citation and acknowledgment of service.
3. Petition for writ of error.
4. Formal order allowing writ of error and allowing supersedeas.
5. The bond on writ of error.
6. The assignments of error.
7. This præcipe.
8. The petition of the plaintiff in the City Court of Elberton.
9. The answer of the defendant in the City Court of
110 Elberton, including paragraph 23 of said answer.
10. The demurrer of the plaintiff to paragraph 23 of the answer of the defendant.
11. The judgment of the City Court of Elberton sustaining said demurrer.
12. The exceptions pendente lite filed in the City Court of Elberton by the defendant to the judgment sustaining the demurrer to paragraph 23 of the answer of the defendant.
13. The motion for new trial filed by the defendant in the City Court of Elberton.
14. The brief of evidence adduced on the trial of the case in the City Court of Elberton.
15. The judgment of the City Court of Elberton overruling said motion for new trial.
16. The bill of exceptions of the defendant assigning error upon the judgment of the City Court of Elberton sustaining the demurrer to paragraph 23 of the answer of defendant and the judgment of the City Court of Elberton overruling the motion for new trial filed by the defendant.
17. The order of the Court of Appeals of the State of Georgia certifying to the Supreme Court of Georgia the questions raised as to constitutionality of sections 2675, 2676 and 2677 of the Civil Code of the State of Georgia of 1910 raised by the defendant
111 in the City Court of Elberton in paragraph 23 of its answer.

18. The opinion of the Supreme Court of Georgia answering said question so certified by the Court of Appeals of the State of Georgia.

19. The opinion of the Court of Appeals of the State of Georgia.

20. The judgment of the Court of Appeals of the State of Georgia.

Whenever a document is specified above, such specification includes also all entries, certificates, endorsements, acknowledgments and filing thereon, therein or attached thereto.

ANDREW J. COBB,
HOWELL C. ERWIN,
LAMAR C. RUCKER,
Attorneys for Plaintiff in Error.

COBB, ERWIN & RUCKER,
H. J. BREWER,
Z. B. ROGERS,
Of Counsel.

Due and legal service of the foregoing præcipe is acknowledged, and having received a copy thereof, all further service and notice is hereby waived.

This 8 day of July, 1915.

ELIZABETH BLACKWELL,
By Her Attorney of Record, PULLIAM PROFFITT.

Filed in my office, this 9 day of July, 1915.

LOGAN BLECKLEY,
Clerk of the Court of Appeals of the State of Georgia.

112 Court of Appeals of the State of Georgia.

CLERK'S OFFICE, ATLANTA, August 3, 1915.

I hereby certify that the foregoing pages hereto attached contain the original writ of error and citation together with a true and complete transcript of those parts of the record in the case of Seaboard Air Line Railway v. Elizabeth Blackwell which are required by the præcipe of the plaintiff in error to be sent to the Supreme Court of the United States, as appears from the records and files of this office.

Witness my signature and the seal of the Court of Appeals of Georgia hereto affixed, the day and year above written.

[Seal Court of Appeals of the State of Georgia, 1906.]

LOGAN BLECKLEY, *Clerk.*

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IN THE UNITED STATES SUPREME COURT,

OCTOBER TERM, 1915.

No. 213

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

VS.

ELIZABETH BLACKWELL, DEFENDANT IN ERROR.

WRITE OF ERROR FROM THE COURT OF APPEALS

OF GEORGIA.

BRIEF OF PLAINTIFF IN ERROR,

SEABOARD AIR LINE RAILWAY.

ANDREW J. COBB,
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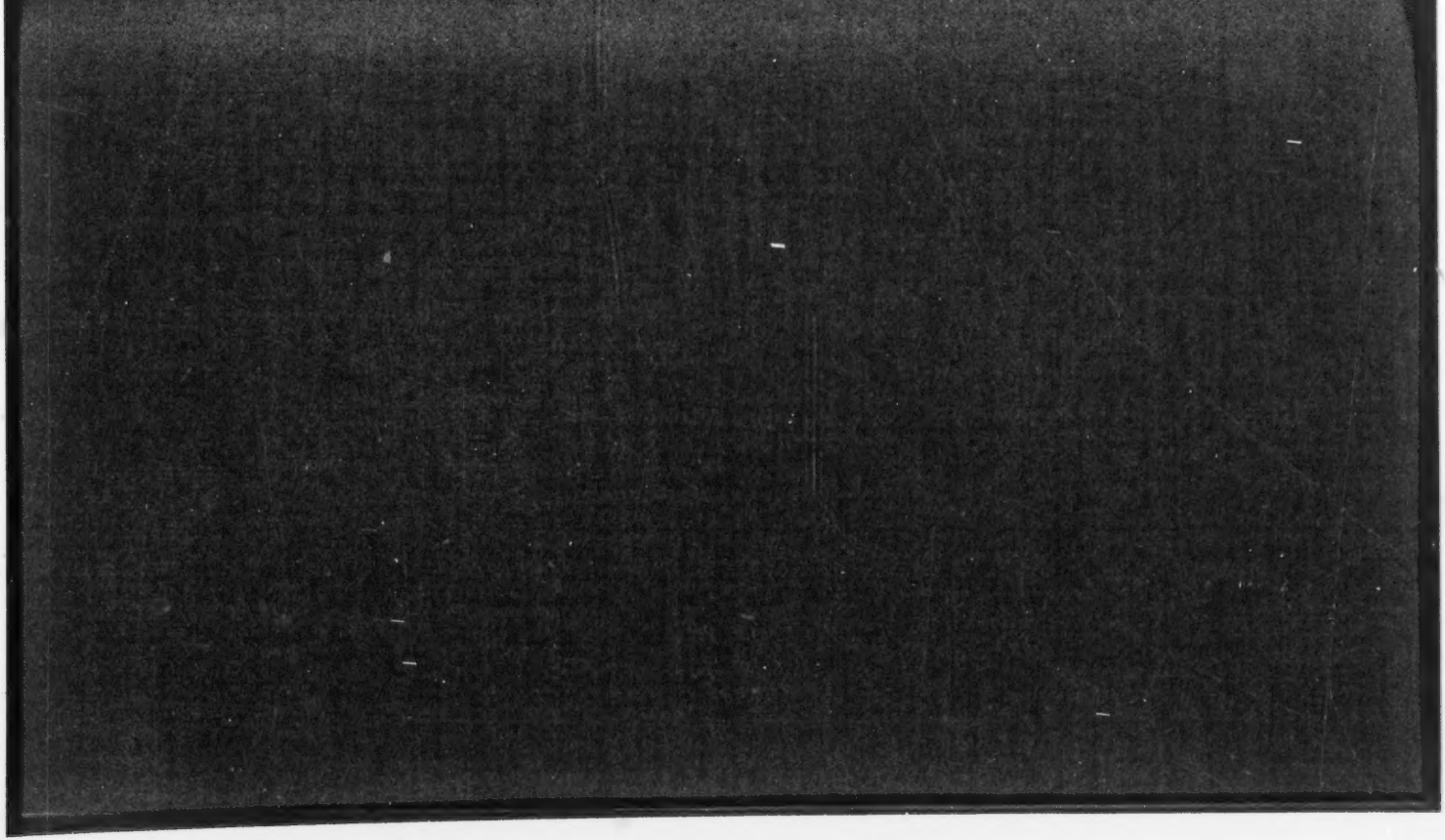
OF COUNSEL.



SEABOARD AIR LINE RAILWAY, Plaintiff in Error, vs. ELIZABETH BLACKWELL, Defendant in Error.	No. 587 OCTOBER TERM, 1915, SUPREME COURT OF UNITED STATES.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

Willie Blackwell, sixteen years old, while riding in a buggy across the track of plaintiff in error, in the night time was struck on a public road crossing four miles outside of Elberton, Georgia, by a train of plaintiff in error consisting of an engine and tender, mail car and two coaches, which train was going from Atlanta, Georgia, to Abbeville, South Carolina. The boy was killed and the mother sued for the homicide, recovering a verdict of $1000.00. The train in question had just passed Elberton on its way to Abbeville, South Carolina.

The defendant set up certain matters of defense, as shown on pages 7 to 12 of the record, but the only material one before this court is that set up in paragraph 23 of the answer beginning on page 8, which in effect set up that the statute of Georgia therein set out, commonly known as the Blow Post Law, resulted in a burden on Interstate Commerce and was, therefore, void.

The original petition filed by the plaintiff, appearing on pages 4 to 6 of the record, was based entirely upon the violation of this statute. Later by an amendment appearing on page 7 the plaintiff in the court below alleged that the injury was caused by a violation of the Blow Post Law, and furthermore that he was killed by negligence of the Railroad Company, without reference to the Blow Post Law.

After the verdict and motion for new trial was filed and overruled, the case was taken to the Court of Appeals of the State of Georgia by proper proceedings, and the said Court certified the question of the constitutionality of the Blow Post Law to the Supreme Court of Georgia. This certificate appears on page 30 of the record. Therein the Court of Appeals says that it desires instruction from the Supreme Court on the question of the constitutionality of this act, "a decision of which is necessary to the determination of the above case (this case)."

By the Constitution of the State of Georgia it is provided:

"The Court of Appeals shall have jurisdiction . . . . . ; except that where, in a case pending in the Court of Appeals, a question is raised as to the construction of a provision of the Constitution of this State or of the United States . . . . . , and a decision of the question is necessary to the determination of the case, the Court of Appeals shall so certify to the Supreme Court, and thereupon a transcript of the record shall be transmitted to the Supreme Court, which, after having afforded to the parties an opportunity to be heard thereon, shall instruct the Court of Appeals on the questions so certified, and the Court of Appeals shall be bound by the instructions so given."

This is Article 6, section 2, paragraph 9, of the Constitution of the State of Georgia, and also appears as Section 6506 of the Code of Georgia of 1911.

Therefore, the Court of Appeals whose judgment is now under review has adjudicated that the question of the constitutionality of the Blow Post Law was necessarily involved in the determination of this case.

There can be no difficulty, then, about the presence of a question of Federal law.

ASSIGNMENT OF ERROR.

The assignments of error are set out on page 48 of the record, and are six in number:

1. The court erred in sustaining the demurrer of the plaintiff to that portion of the answer of the defendant embraced in paragraph 23 thereof and in striking such portion of said paragraph.

2. The court erred in affirming the judgment of the City Court of Elberton in sustaining the demurrer of the plaintiff to that portion of the answer of the defendant embraced in para-

graph 23 of such answer and in striking such portion of said answer.

3. The court erred in holding that the provision of section 2675 of the Civil Code of the State of Georgia of 1910, which requires the engineer of a locomotive to check the speed thereof on approaching a public road crossing, so as to stop in time should any person or thing be crossing the railroad track on said road, was not unconstitutional as applied to a railway train while engaged in interstate commerce under the conditions set set forth in paragraph 23 of the defendant's answer, on the ground that as thus applied the statute is a regulation of interstate commerce and repugnant to the provision of the Constitution of the United States that "the Congress shall have power to regulate commerce with foreign nations and among the several states."

4. The court erred in holding that the facts alleged in paragraph 23 of the defendant's answer were not a complete defense available to the defendant as against the allegations in the petition of the plaintiff that the failure to comply with the provisions of section 2675 of the Civil Code of Georgia of 1910, which requires the engineer of a locomotive to check the speed thereof on approaching a public road crossing, so as to stop in time should any person or thing be crossing the railroad track on said road, was an act of negligence rendering the defendant liable.

5. The court erred in holding that the trial judge, the Judge of the City Court of Elberton, did not err in sustaining the demurrer to the 23rd paragraph of the answer of the defendant wherein the defendant pleaded that the failure to comply with the "Blow Post Law", as embodied in sections 2675, 2676 and 2677 of th Civil Code of the State of Georgia of 1910, was not, as a matter of law, negligence on the part of the defendant relatively to the transactions set forth in the petition of plaintiff, and in thereafter striking that paragraph of the answer.

6. The court erred in holding that in view of the evidence as to the defendant's failure to comply with the provisions of the Blow Post Law, being the law embodied in sections 2675, 2676 and 2677 of the Civil Code of the State of Georgia of 1910, that there was sufficient testimony as a whole to support the jury's finding in favor of the plaintiff.

ARGUMENT.

The question of the constitutionality of this satute has before been before this court in the case of Southern Railway vs King, 217 U. S. Rep. page 524, 30 S. C. R. page 594. In that case there was enough said by the court to justify the presumption that whenever this statute came clearly before the court it would be held unconstitutional. In the opinion it was held that so far as dangerous crossings were concerned the State might regulate the manner of approach to such crossings. The majority of the court held further that general averments in a plea that this Blow Post statute would require such loss of time as to become a burden upon interstate commerce did not sufficiently set out as a matter of law such facts as would justify the court in passing upon the unconstitutionality of this statute. There the character of the particular train, the nature of the particular crossing and the other ones to be crossed were not set out.

PLEA IN THE BLACKWELL CASE.

Paragraph 23 of this plea, as stated before, is set out on pages 8, 9, 10, 11 and 12 of the record.

It would be almost impossible and certainly impracticable to set out in greater detail the reasons why in the instant case the Blow Post Law operated as a burden upon interstate commerce.

DEMURRER.

To this plea a demurrer was filed, and as the nature of it is material it is set out in full. It appears on page 12. ~~and as the nature of it is material it is set out in full.~~

"Now at the first term of said case comes the plaintiff and demurs to the 23rd paragraph of defendant's answer and moves to strike the same because the same fails and is insufficient to set up any legal defense against the cause of action set out in plaintiff's petition."

This demurrer was sustained and the plea striken.

GENERAL AND SPECIAL DEMURRER.

It is clear from the decisions of the Supreme Court of Georgia that this was a general demurrer.

In Martin vs The Bartow Iron Works, 35 Ga., reported on page 323, our Supreme Court says:

"A general demurrer enables the party to assail every substantial imperfection in the pleadings of the opposite side without particularizing any of them in his demurrer; but if he thinks proper to point out the faults, this does not vitiate it."

"A special demurrer goes to the structure merely, and not to the substance, and it must distinctly and particularly specify therein the defect lies; and, indeed, the statutes 27, Eliz., and 4 and 5 Anne, as it is said, oblige the party demurring to lay, as it were, his finger on the very point, otherwise the demurrer may not be noticed."

At this time let us quote the first head-note of this case, which appears on page 320:

"Conciseness in pleading recommended: verboseness, as well as curious and refined subtleties, condemned."

This interpretation of our laws has never been modified in the slightest particular.

In Trammell vs Columbus Railroad Company, 9 Ga. App. 98, in head-note 7, the court in a decision rendered in 1910 says:

"A special demurrer is required to put its finger upon the very point as to which the defendant seeks information, and as it cannot upon a general demurrer be declared that the general statements made are untrue, neither can it upon general demurrer *be adjudged that they are not sufficiently specific.*"

"In some jurisdictions the petition would have been held to be bad in substance, and for that reason subject to a general demurrer on the ground that 'it did not state facts sufficient to constitute a cause of action.' Under our liberal system of pleading, there being enough to amend by, the incomplete and partial statement of facts would be treated as a defect in form rather than as a defect in substance. For that reason it was good as against a motion to dismiss on general demurrer."

Kemp vs Central Railway Co., 122 Ga. 559.

This decision was delivered by the late Mr. Justice Lamar while a member of the Supreme Court of Georgia, and the entire decision is respectfully called to the attention of the court.

To the same effect see White vs Parks, 93 Ga. 635, and Pullman Palace Car Co. vs Martin, 92 Ga. 161.

So this must be held to have been a general demurrer.

Even if it had been a special demurrer, reasonable certainty is all that could have been required.

Atlantic Coast Line R. R. Co vs Davis & Brandon, 5th Ga. App. page 214;

Charleston & Western Carolina Ry Co. vs Attaway, 7th Ga. App. page 231;

Flint River & N. E. Ry. Co. vs Maples, 10th Ga. App. 573.

In the last case it is said:

"Complete particularity of statement is not required where a reasonable inference, from the statements made, readily suggests the facts."

AMENDMENT.

It will be observed that the demurrer to the plea in this case, wheih was sustained by the trial court, ((See page 12 of the record), is couched in almost exactly the quoted language of the demurrer in the case of Kemp vs Central Railway, supra, where Judge Lamar held the same to be general demurrer.

Besides, "Unless it appear that the demurrer to a plea were special it will be presumed to have been general."

Jones vs Lavender, 55 Ga. 228, head-note 4.

So this plea, having been stricken without any provision for amendment, was necessarily held bad by the trial court, because the same did not set out any legal defense, and not because the same was insufficient in matters of detail.

Under our law "All parties, whether plaintiffs or defendants, in the superior or other courts, whether at law or in equity, may at any stage of the cause, as matter of right, amend their pleadings in all respects, whether in matter of form or of substance, provided there is enough in the pleadings to amend by."

This is the Code of Georgia of 1911, section 5681.

Wherever an order sustaining a demurrer is made, under our practice the other party is given time to amend.

Ripley vs Eady, 106 Ga. 422.

"Assuming that a cause of action is stated, the office of a special demurrer is to eliminate all improper, superfluous and unnecessary matter, or to compel the plaintiff to give the defendant definite and specific information with sufficient fullness and certainty to enable him to make his defence; *or upon the plaintiff's refusal so to do, to send his case out of court.*

R. & D. Railroad Co. vs Mitchell, 95 Ga. 78, and the opinion on page 85.

So the order of the court sustaining the demurrer, not providing for amendment, shows that the court below dealt with the plea as being bad in substance and in not setting up matters which afforded a defense to the plaintiff's cause of action.

DUTY OF THIS COURT.

We contend that as the unconstitutionality of the act was especially set up and the application of this act to the facts in question set out with particularity and detail, and that as the Court of Appeals has certified that the constitutionality of this act was necessarily involved in the determination of the case, this court must pass upon the Federal question.

In Kansas City Southern Railway Co. vs Mrs. Nora M. Jones, 36 S. C. R. page 513, this court held:

"Reversible error is committed by the highest court of a state in ruling that evidence of contributory negligence in an action under the Federal employers' liability act, which it found that the trial court had rejected for a wrong reason, viz., because contributory negligence was not pleaded, was nevertheless preperly excluded because it was not offered for the specific purpose of mitigating the damages, where there was no settled local rule requiring counsel, without inquiry by the court, to announce in advance the purpose for which evidence is tendered."

" . . . . . the principle by which we follow and sustain the local law as applied by the court below unless we are constrained to the contrary by a sense of clear error committed."

Villanueva vs Villanueva, 36 S. C. R. (U. S.) 111.

"In dealing with the enactments of a paramount authority, such as Congress is, within its sphere, over the states, (we will not) allow substantive rights to be impared under the name of procedure."

Atlantic Coast Line R. R. Co. vs General Burnette, 36 S. C. R. (U. S.) page 75.

OPINION OF THE SUPREME COURT OF GEORGIA.

This appears on pages 31 to 41 of the record.

Exactly what this opinion does hold is not to be ascertained except from a close reading of the whole language thereof. On page 32 the court does say:

"The statute is an exercise of the police power of the State, though to some extent it may indirectly affect interstate transportation."

On page 36 of the record Justice Lumpkin in his opinion treats the case of Southern Railway vs King, supra, as controlling on all questions involved. He endeavors to set out that the plaintiff in error may not in its plea, in paragraph 23, have sufficiently

come within the ruling in the King case in giving with particularity the number, danger and location of the crossings. He says first that the nature of the crossing on which the boy was killed was not set out.

Remember that the court is not construing a law or rule of practice of the State Court, but is endeavoring to apply a decision of this court.

In answer to his criticism we refer the court to the allegation in paragraph 23 of the plea, which appears on page 11.

"This defendant further alleges that the 124 public crossings above referred to are the usual and ordinary grade crossings, and there is nothing in the conditions—surroundings which makes any one of them peculiarly dangerous other than such danger as may result from the crossing of a public road by a railroad track at grade."

There could not be made a more positive allegation that there were no peculiar dangers in this particular crossing and that there were no dangers in such crossing except those that arise by reason of the fact that a railroad crosses a public road at grade. The plea distinctly sets out that there are 124 grade crossings on the line of railroad in question traversed by the train in question within the territory of Georgia and within the 125 miles of such track.

The plaintiff in error distinctly puts itself in the class that has the right to attack this statute, because it says that none of these crossings is peculiarly dangerous, and, therefore, this court must pass upon the question as to whether 124 crossings not unusually or peculiarly dangerous, scattered over a distance of 125 miles, would not result in making the Blow Post Law a burden on interstate commerce, because compliance with the law, on the facts of this case, would result in a minimum increase of the scheduled time of the railroad of six hours, and increase such schedule from four to ten hours.

Therefore, the first head-note of this court in the opinion in Southern Railway vs King can have no application to the present case. The crossings on which the damage occurred was not a dangerous crossing, nor were any of the other 123 crossings on the route dangerous crossings.

The second head-note can have no application to our case, because every detail of the makeup of this train and the effect

of a stop thereon within the limits of the law and the number of such crossings and the character of the same are particularly set out.

To say that any more details should be furnished would be to change the pleadings into the evidence.

In the opinion of the State Supreme Court it is further said that it may be that these crossings are close together and that some of them may be in cities. In answer to this it is shown that that part of paragraph 23 above set out is a complete answer, because it says that none of the crossings are unusually or peculiarly dangerous, and, therefore, the presence of them in a city or in the country is immaterial. The distance between the crossings is further immaterial. If the crossings were closer together than 800 yards the only effect of this would be that the train would have to creep instead of run. If the crossings were equal distance from each other, the minimum time lost at each crossing would be three minutes, as set out in the pleadings. The Supreme Court of Georgia and this court must take judicial cognizance of certain facts.

U. S. vs Rio Grande Dam & Irrigation Co., 174 U. S. 690, and Southern Railway vs King, supra, and

The plea states the defense as mildly as may be. As just argued, if the crossings were more than 800 yards apart the minimum time lost is three minutes per crossing. If the crossings were nearer each other, the time lost would be greater, because no speed could be gotten up between the crossings and the train would have to crawl.

Besides, under the authorities previously submitted, there was no calling upon the plaintiff in error by the plaintiff in the court below for details as to the precise location of these crossings.

As stated before, the Supreme Court of Georgia is merely applying the rule in Southern Railway vs King, supra, to the instant case, and is not questioning the sufficiency of the plea from the standpoint of Georgia law and practice. Indeed, from the Georgia law and practice quoted by us in this brief the plea is ample in its details, and if not ample, was good until attacked by demurrer calling for such details.

We wish to emphasize here the proposition that the Supreme Court of Georgia was not holding that the plea of defendant was lacking in details under the rule of practice of the State of Geor-

The Supreme Court of the State of Georgia attempts to save this statute as being an exercise of the police power from the State. This will not protect it where it regulates and burdens interstate commerce.

Charleston & Western Carolina Ry. Co. vs. Varnville Furniture Co., 35 S. C. R. (U. S.) 715, 237 U. S. page 597.

Respectfully submitted.

ANDREW J. COBB,
HOWELL C. ERWIN,
LAMAR C. RUCKER.

COBB, ERWIN & RUCKER,
of Counsel.

SEABOARD AIR LINE RAILWAY *v.* BLACKWELL.

ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

No. 213. Submitted April 24, 1917.—Decided June 4, 1917.

That provision of the "Blow-Post" law of Georgia (Civil Code, 1910, §§ 2675–2677), which requires railroad companies to check the speed of trains before public road crossings so that trains may be stopped in time should any person or thing be crossing the track there, is a direct and unconstitutional interference with interstate commerce as applied to the state of facts specifically pleaded by the defendant interstate carrier in this case, whereby it appears that, to comply with the requirement, the interstate train in question would have been obliged to come practically to a stop at each of 124 ordinary grade crossings within a distance of 123 miles in Georgia extending from Atlanta to the South Carolina line, and that more than six hours would thus have been added to the schedule time of four hours and thirty minutes. *Southern Railway Co.* v. *King*, 217 U. S. 524, distinguished.

16 Ga. App. 504, reversed.

THE case is stated in the opinion.

Mr. Lamar C. Rucker, Mr. Andrew J. Cobb, Mr. Howell C. Erwin and *Mr. W. L. Erwin* for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This writ of error is directed to a judgment entered upon a verdict for the sum of $1,000 in the city court of Elberton, Georgia, for the death of a son of defendant in error alleged to have been caused by the railway company.

The judgment was affirmed by the Court of Appeals of Georgia.

The facts as charged are: That the deceased was driving a horse and buggy along a public road in the county of Elbert and while crossing the railroad track of the railway company at a public crossing outside of the city of Elberton he was struck by the engine of one of the company's passenger trains and received injuries from which he died three days later.

That the employees of the company in charge of the train failed to blow the engine whistle at the blow-post 400 yards south of the crossing, failed to keep blowing it until the train arrived at the crossing, and failed to check the speed of the train at such blow-post and keep it checked until the train reached the crossing, and, so failing, the company was guilty of negligence.

That the employees of the company failed to keep the train under control and approached the crossing at a high and dangerous rate of speed so that they could not stop the same in time to save the life of the deceased, and that such conduct was negligence. And that "such conduct was negligence if they saw said deceased on the crossing, and it was negligence if they did not see him, and it was negligence under the blow-post law,[1] and it was negligence regardless of the blow-post law."

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[1] "Sec. 2675. *A post to be erected.* There must be fixed on the line of said roads, and at the distance of four hundred yards from the center of each of such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road.

"Sec. 2676. *Neglecting to erect such posts.* Should any company fail or neglect to put up said posts, the superintendent thereof shall be guilty of a misdemeanor.

"Sec. 2677. *Failing to blow whistle.* If any engineer neglects to blow

The company by its answer denied the various acts of negligence charged against it and its employees and denied "that the failure to comply with said blow-post law was negligence on its part relatively to the transaction in question."

The company set out the applicable sections of the law and alleged that its train was running in interstate commerce between the States and especially between Georgia and South Carolina. That between the city of Atlanta, Georgia, and the Savannah River, a distance of 123 miles, where the same is the boundary line of Georgia, there are 124 points where the line of the railroad crosses public roads of the different counties of the State, established pursuant to law, and that all of such crossings are at grade.

That in order to comply with the law the speed of a train would have to be so slackened that there would be practically a full stop at each of the road crossings; that the time required for such purpose would depend upon various conditions, which might or might not exist at the time and at the crossings, among others, the state of the weather and the percentage of grade; but it would not be less than three minutes for a train composed of an engine and three cars, and for a train of a greater number of cars the time would be greater—for an average freight train, not less than five minutes.

That the train alleged to have caused the death of the deceased was composed of an engine, a mail car and two coaches, and that if the blow-post law had been complied

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said whistle as required, and to check the speed as required, he is guilty of a misdemeanor: Provided, that within the corporate limits of the cities, towns, and villages of this State, the several railroad companies shall not be required to blow the whistle of their locomotives on approaching crossings or public roads in said corporate limits, but in lieu thereof the engineer of said locomotive shall be required to signal the approach of their trains to such crossings and public roads in said corporate limits, by tolling the bell of said locomotive; and on failure to do so, the penalties of this section shall apply to such offense."

with on the day in question at least three minutes would have been consumed at each crossing, more than six hours between Atlanta and the Savannah River. That the running time between those points according to the adopted schedule was four hours and thirty minutes. That if the law had been complied with the time consumed between those points would have been more than ten and one-half hours.

That for freight trains the time consumed would be more than sixteen hours, the maximum speed of such trains on the company's road being twenty miles an hour.

That the crossings are the usual and ordinary grade crossings and there are no conditions which make any one of them peculiarly dangerous other than such danger as may result from the crossing of a public road by a railroad track at grade.

That between the City of Atlanta and the Savannah River the line of the company's railroad crosses the tracks of two other railroads and that under the laws of the State a train is required to come to a full stop fifty feet from the crossing and that the time so consumed would increase the time required to operate between the points referred to.

That the law as applied to the train in question is an unreasonable regulation of interstate commerce and a violation of Paragraph 3, § 8, Article I, of the Constitution of the United States, and that therefore the company is not guilty of the various acts of negligence charged against it.

Upon demurrer to the answer of the company the averments in regard to the law were struck out except the denial that the failure to comply with the law was negligence on the company's part "relatively to the transaction in question."

The case so went to the jury, including the defense that the deceased failed to exercise ordinary care and diligence

for his own safety. The jury returned a verdict for the sum of $1,000.

A motion for a new trial was denied. The railway company then took the case to the Court of Appeals of the State and that court invoked the instruction of the Supreme Court upon the question whether that part of the law (§ 2675, Civil Code of the State) which requires the engineer to check the speed of the train on approaching a public crossing, so as to stop in time should any person or thing be crossing the railroad track on its road, is unconstitutional so far as an interstate train is concerned, under the conditions set forth in the answer of the company, for the reason that as thus applied the statute is a regulation of interstate commerce and repugnant to the commerce clause of the Constitution of the United States.

The Supreme Court answered the question in the negative. The opinion of the court is very elaborate, but the basis of it is that the law is a valid exercise of the police power of the State, that there was no displacement of its exercise by congressional action, and that by its exercise in the law in question it did not directly burden interstate commerce.

The Court of Appeals accepted necessarily the views of the Supreme Court and sustained the ruling of the trial court upon the demurrer to the plea of the company that the law violated the commerce clause of the Constitution.

To the contention of the company that the deceased had not observed ordinary care for his own safety and could have avoided the injury which resulted in his death, the court answered that it was a jury question, and said: "In view of the evidence as to the defendant's failure to comply with the provisions of the 'blow-post law' there is sufficient testimony as a whole to support the jury's finding in favor of the plaintiff." The court hence affirmed the judgment.

It will be observed, therefore, from this statement that

the law of the State was an element in the decisions of the state tribunals and its constitutionality was sustained against the attacks of the railway company. The question is, therefore, presented for our consideration. In its consideration we need not descant upon the extent of the police power of the State and the limitations upon it when it encounters the powers conferred upon the National Government. There is pertinent exposition of these in *Southern Railway Co.* v. *King*, 217 U. S. 524, in which the law now under review was passed upon. The case is clear as to the relation of the powers and that the power of the State cannot be exercised to directly burden interstate commerce. It was recognized that there might be crossings the approach to which the State could regulate. But, on the other hand, it was said there might be others so numerous and so near together that to require the slackening of speed would be practically destructive of the successful operation of interstate passenger trains, and, therefore, "statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation, but also a direct burden upon interstate commerce, and therefore beyond the power of the State to enact."

That case went off on a question of pleading. An answer was filed that did not invoke the Federal Constitution. This was attempted to be done by an amended answer which was very general and to which a demurrer was sustained. At the trial of the action there was an offer of evidence of the specific effect of the law upon the operation of trains as showing the impediment of the law to interstate commerce. The evidence was excluded. This court sustained the ruling on the ground that the evidence was not admissible under the pleadings. The ruling upon the demurrer to the answer was sustained on the ground that the answer contained only general averments constituting "mere conclusions." It was said that the aver-

ments "set forth no facts which would make the operation of the statute unconstitutional. They do not show the number or location of the crossings at which the railway company would be required to check the speed of its trains so as to interfere with their successful operation. For aught that appears as allegations of fact in this answer the crossing at which this injury happened may have been so located and of such dangerous character as to make the slackening of trains at that point necessary to the safety of those using the public highway, and a statute making such requirement only a reasonable police regulation, and not an unlawful attempt to regulate or hinder interstate commerce. In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer set up no legal defense, and that the demurrer thereto was properly sustained."

The facts so specified and which it was decided would give illegal operation to the statute are alleged in the present case, and, assuming them to be true—and we must so assume—compel the conclusion that the statute is a direct burden upon interstate commerce, and, being such, is unlawful. The demurrer to the answer averring them was therefore improperly sustained.

We express no opinion on the third defense of the company.

Reversed and case remanded for further proceedings not inconsistent with this opinion.

THE CHIEF JUSTICE, MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS dissent on the ground that the regulation in question was within the class which the State is entitled to enact in the absence of congressional action, and until such action. There having been no action by Congress, there is therefore no ground for holding the state action void as a regulation of interstate commerce.